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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 199.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

H. FRED MILLER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED FEBRUARY 1, 1913.

(22,000.)

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No. 15794.

MILLER
v.
CHICAGO, B. & Q. R. CO.

Pleas before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 21st Day of September, 1909.

Present:

Hon. Manoah B. Reese, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William B. Rose, Judge.
Hon. Jesse L. Root, Judge.
Hon. James R. Dean, Judge.

Attest:

H. C. LINDSAY, *Clerk.*

Be it remembered, That on the 30th day of July, 1908 there was filed in the office of the Clerk of said Supreme Court a certain transcript, in the words and figures following, to-wit:

2–5 Pleas in the District Court of the Twelfth Judicial District of Nebraska, in and for the County of Custer, at a Term Thereof Begun and Holden in the City of Broken Bow, in said County, on the Third Day of February, One Thousand Nine Hundred and Eight.

Present:

Honorable Bruno O. Hostetler, Judge.
Geo. B. Mair, Clerk.

Filed May 20, 1908. Geo. B. Mair, Clerk of the District Court, Custer Co., Neb.,

* * * * * * *

6 And afterwards, on the 7th day of June, 1907, there was filed in the office of said Clerk, in words and figures following, a certain

Amended Petition.

In the District Court of Custer County, Nebraska.

H. FRED MILLER, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

Comes now the plaintiff and shows to the Court and alleges the fact to be:

That the defendant is a corporation duly organized and existing under the laws of the State of Iowa, providing for the organization of railroad companies and was and is organized for the purpose of owning, operating and controlling a line of railroad from Chicago in the State of Illinois, westward through the State of
7 Iowa and through the State of Nebraska; that said defendant owns, operates and controls a line of railroad through said states passing through the town of Cambria in the State of Iowa to and through the town of Broken Bow in the State of Nebraska, and as such is, and for a number of years past, has been engaged in the transportation of stock, merchandise, freight and persons over said line for hire.

That on September 18th, 1906, this plaintiff and plaintiff's brother Luther Miller at Cambria, Iowa, placed in charge of the said defendant Company, two horses to be transported together in the same car by it from Cambria, Iowa to the said Luther Miller at Broken Bow, Nebraska.

That one of said horses was a stallion valuable for breeding purposes, purchased and owned by plaintiff for the purpose of selling again to others desiring a horse for breeding purposes.

That said horse belonged to that family of horses known as coach horses and was registered by and in the records of the American Registry Association; was a horse of perfect breeding and pedigree and was a perfect bred coach stallion free from blemish and was of the reasonable value at Broken Bow, Nebraska, and upon the general market for such horses, of $2000.00.

That at the time plaintiff delivered to defendant said stallion the defendant agreed and undertook to transport said horses from said point in Iowa to Broken Bow, Nebraska, and charged plaintiff the usual tariff or freight therefor, and plaintiff undertook and agreed to pay the same in consideration of the transportation of said horses.

Plaintiff further states that he did not accompany said car or said horses and did not attend said shipment of horses, nor did any other person for him or on his behalf do so. That thereafter while
8 in transit and somewhere in the vicinity of the town of Pacific Junction, Iowa, the exact place plaintiff is unable to state but is informed and believes was between the town of Hastings and Pacific Junction in the State of Iowa, the defendant Company, carelessly and negligently caused and permitted the car in which said horse was being transported to become and be on fire

and said horse was therein and thereby suffocated and burned; and by reason of said fire carelessly and negligently caused and permitted as aforesaid, said horse to become frightened and panic-stricken and he lunged about and against the sides of the car and by reason thereof, became bruised and injured; and by said fire he was suffocated and partially strangled by the smoke and his lungs scorched and burned; that during said fire and immediately prior thereto and thereafter, said train of which said car formed a part, was by the agents and employés of defendant Company run rapidly for some distance and at a point, the exact location of which is unknown to plaintiff, but plaintiff is informed and believes was near the station of Pacific Junction Iowa, said train was carelessly and suddenly stopped while going at a great speed and said horse by reason thereof, was thrown against the side and floor of said car and thereby injured. Because of said injuries, suffocation and burning due to the negligence and carelessness of said defendant as aforesaid, said horse died while in the car and in transit as aforesaid, and said horse died as the result of the carelessness and negligence of defendant Company, and because of the injuries received by him in the manner hereinbefore charged, plaintiff states that he is unable to say just where said horse died but he is informed and believes and charges the fact to be, that said horse died while so in transit somewhere between the station of Lincoln Nebraska, and Broken Bow, Nebraska.

By reason of the premises plaintiff has been damaged in the sum of $2000.00. This said amount, the plaintiff at once or
9–11 shortly thereafter claimed and demanded of defendant, but said defendant has refused to pay said sum or any part thereof.

Wherefore plaintiff prays judgment against the said defendant for the sum of $2000.00 together with interest thereon at the rate of seven per cent. per annum from September 18th, 1906, together with costs of this action.

H. FRED MILLER,
By SULLIVAN & SQUIRES,
His Attys.

STATE OF NEBRASKA,
Custer County, ss:

Luther Miller being first duly sworn upon his oath deposes and says: That he is the agent of the plaintiff in the above entitled cause; that said plaintiff is a non-resident of the State of Nebraska and is absent therefrom; that he has read and knows the contents of the foregoing amended petition and that the facts therein stated are true as he verily believes.

LUTHER MILLER.

Subscribed and sworn to before me this 7th day of June, 1907.
[NOTARIAL SEAL.] NAVY V. PIERSON,
Notary Public.

My commission expires Sept. 3, 1907.

* * * * * * *

12 And afterwards, on the 24th day of January, 1908, there was filed in the office of said Clerk, in words and figures following, a certain

Amended Answer.

In the District Court of Custer County, Nebraska.

H. FRED MILLER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

The defendant for amended answer to the petition alleges that it is a corporation organized according to the laws of the state of Iowa, and that it operated certain lines of railroad in the states of Iowa and Nebraska at the time stated in the petition.

Further answering the defendant says that it does not know whether the plaintiff was the owner of, or interested in the horse referred to in the petition at the time stated, and therefore denies such owner-ship or interest.

13 The defendant further alleges that the shipment of said horse was made upon a written and printed contract entered into between the shipper and the company by which it was agreed that the shipper, or some person in charge for him, would care for, attend to, feed, water and provide for the physical comfort of said horse throughout the shipment, and that he would bed the car and attend to the horse therein, and if said bedding took fire and said horse was injured thereby, it was due to the fault and carelessness or neglect of duty on the part of the plaintiff or the person in charge of said shipment for him, or to the nature and propensities of the animal himself, and was not due to nor the result of the carelessness, neglect or failure of duty on the part of this defendant.

The contract for the shipment of said horse and the actual transportation of him was from Cambria Iowa to Broken Bow Nebraska and in making said contract of shipment it was agreed between the plaintiff and the defendant that the rate of charge for said shipment should depend upon and be proportioned to the value of said horse, which value was to be fixed and declared by the plaintiff, and on said value he was advised of the rate to be charged, and that a greater rate would be charged for a greater value, and in pursuance of said agreement the plaintiff placed a value of $100.00 upon said horse upon which valuation the freight rate was determined and obtained the benefit of the lower rate determined rather than the higher rate on the higher valuation, according to the tariffs and classifications of the defendant, published and in force according to law at the time, whereby said plaintiff is bound by said valuation, and in no event could he recover more than $100.00 for the injury or loss of said horse in said shipment.

Further answering the defendant denies each and every allegation in said petition except as herein stated.

14 Wherefore defendant prays judgment against the plaintiff for costs.

FRANK E. BISHOP,
FRED M. DEWEESE,
C. L. GUTTERSON,
For Dft.

STATE OF NEBRASKA,
Lancaster County, ss:

Frank E. Bishop, being first duly sworn on oath says that he is one of the attorneys for the defendant above named, which is a corporation, that he has read the foregoing amended answer, knows the contents thereof, and that the matters therein stated are true as he verily believes.

FRANK E. BISHOP.

Subscribed in my presence and sworn to before me this 23rd day of January, 1908.

[NOTARIAL SEAL.] FRED M. DEWEESE,
Notary Public.

And afterwards, on the 4th day of February, 1908, there was filed in the office of said Clerk, in words and figures following, a certain

Order to Confess Judgment.

In the District Court of Custer County, Nebraska.

H. FRED MILLER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

Comes now the defendant, the Chicago, Burlington and Quincy Railway Company, and offers in open court to confess judgment in favor of the plaintiff on the cause of action sued on this
15 action for the sum of one hundred dollars with seven per cent interest from the date said cause of action accrued, to-wit: the 18th day of September, 1906, and costs to this date.

Dated this 4th day of February, 1908.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,
By FRANK E. BISHOP,
C. L. GUTTERSON AND
ARTHUR R. WELLS, *Att'ys for Dft.*

Received a copy of above this 4th day of February, 1908 and refuse the offer.

H. FRED MILLER,
By SULLIVAN AND SQUIRES.

* * * * * * *

16 And afterwards, on the 7th day of February, 1908, there was filed in the office of said Clerk, in words and figures following, a certain

Reply.

In the District Court of Custer County, Nebraska.

H. FRED MILLER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

Comes now the plaintiff and for reply to the amended answer of the defendant alleges:

That the allegations of new matter contained in said answer and found in paragraphs set out in said amended answer prior to the paragraph which is just preceding the prayer for relief therein, are insufficient to constitute a defense to plaintiff's cause of action set forth in his petition.

17 2.

This plaintiff does not waive the demurrer set forth in the preceding paragraph herein, but all the while insisting upon the same denies each and every allegation of new matter in said amended answer contained.

3.

This plaintiff states that the horse set forth in his petition was shipped by the plaintiff from Cambria, Iowa, to Broken Bow, Nebraska, and that said shipment was over the road and through the agency of the Chicago, Burlington & Quincy Railway Company.

That the State of Iowa enacted a law which now obtains in said State and which is as follows:

"No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of any common carrier, or carriey of passengers which would exist had no contract, receipt, rule or regulation been made or entered into."

Plaintiff alleges that said provision of law now existing in the State of Iowa as aforesaid, was enacted in that state prior to the year 1906 and was the law of that state at the time said horse was shipped, as set forth in plaintiff's petition. Said provision of law is compiled in the Code of Iowa for the year 1897 and is numbered Section 2074.

4.

Plaintiff alleges that when he shipped said horse as set forth in his petition, he did not agree with the defendant through himself or any other person, or agent, upon what the valuation of said horse was at the time of the shipment, or at any other time, and plaintiff never authorized or empowered any other person or agent

to agree for him as to what the valuation of said horse was at the time of said shipment, or at any other time.

18 Plaintiff alleges that he never agreed with the defendant at the time said shipment was made, that the defendant might be relieved from any liability which he might incur with reference — or in connection with the said shipment of said horse as set forth in plaintiff's petition, or waive, release and discharge the defendant from any such liability, nor did the plaintiff at any time ever authorize any other person or agent to waive, release or discharge the said Company from any such liability, and plaintiff never had any knowledge that any person or agent for him, had agreed with defendant upon any valuation of said horse at the time of said shipment, or at any other time, or had for him waived, released and discharged said defendant from any liability which it might incur with reference to or in connection with the said shipment of said horse as aforesaid. And this plaintiff denies that he ever through himself, or any other person, agreed with the defendant upon any valuation of said horse, or waived, discharged or released said defendant from any liability with reference to the shipment of said horse or in connection with the same as set forth in his petition.

This plaintiff alleges that had the defendant charged the plaintiff as freight for the shipment of said horse from Cambria, Iowa, to Broken Bow, Nebraska, at the time said shipment was made as set forth in his petition, more than the sum of $35.00 said sum would have been unreasonable, extortionate and unlawful charge for the services of defendant in shipping said horse as aforesaid.

Wherefore this plaintiff asks for the judgment prayed for in his petition.

H. FRED MILLER,
By SULLIVAN & SQUIRES,
His Attorneys.

STATE OF NEBRASKA,
Custer County, ss:

Edwin E. Squires being first duly sworn upon oath says: He is one of the attorneys for the plaintiff above named, and that the plaintiff is a non-resident of the State of Nebraska and absent therefrom. Affiant says that he has read the foregoing reply and that the facts therein alleged are true as he verily believes.

EDWIN E. SQUIRES.

Subscribed and sworn to before me this 7th day of February, 1908.

NAVY V. PIERSON,
[NOTARIAL SEAL.] *Notary Public.*

My commission expires Sept. 3, 1912.

And afterwards, on said 7th day of February, 1908, there was filed in the office of said Clerk, in words and figures following, a certain

Stipulation.

In the District Court of Custer County, Nebraska.

H. FRED MILLER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

Whereas, upon the trial of this cause the defendant desires to offer and introduce in evidence, certain tariffs, schedules and classifications showing the rates and charges governing the transportation of the stallion for whose loss this suit is maintained, and the terms and conditions upon which said stallion was accepted for shipment; and

Whereas, said tariffs, classifications, rates and schedules have been published and files with the Interstate Commerce Com-
20 mission pursuant to the Act of Congress approved February 4th, 1887, and the Acts amendatory thereof and supplemental thereto, commonly called the Interstate Commerce Acts; and

Whereas, the defendant represents that the said tariffs, rates, schedules and classifications have been so duly published and filed and would be competent evidence in said cause if properly certified by the Interstate Commerce Commission as provided by the Interstate Commerce law;

Now, therefore, it is stipulated and agreed by and between the parties hereto that the plaintiff waives the authentication and certification of said tariffs, rates, schedules and classifications by the Secretary of the Interstate Commerce Commission under the seal thereof, and consents and agrees that the said tariffs, rates, schedules and classifications may be identified by the parole testimony of some employé of defendant Company, who has knowledge thereof as being the tariffs, rates, schedules and classifications applicable to said shipment; and the plaintiff further stipulates that he will admit of record, that the said tariffs, rates, schedules and classifications are what they purport to be, and that they have been duly published and filed with the Interstate Commerce Commission as required by law; and that when so identified by said employé of the defendant, having knowledge thereof, if the same are by the defendant offered in evidence at the trial of said cause, the plaintiff will make no objection to the asmission of the same on the ground that they have not been duly certified to by the Secretary of the Interstate Commerce Commission under the seal thereof.

Plaintiff further stipulates and agrees that should the defendant offer in evidence, under the same proof as above provided, the schedule of reasonable maximum rate of charges for the
21 transportation of freight and cars on each of the railroads of the State of Iowa together with the classification of rates prepared by the Board of Railroad Commissioners of the State of Iowa, in accordance with the laws of said State, number thirteen, the

plaintiff will make no objection to the introduction of the same on the ground that the same have not been duly certified to by the said Commissioner under the seal thereof.

It is understood that this stipulation is made in reliance upon the representation of the defendant that the tariffs, rates, schedules and classifications which shall be offered by it, will be what they purport to be.

This stipulation shall not be construed as waiving, on the part of the plaintiff, any claim as to the insufficiency of the defense as a matter of law, in support of which, the said proofs are offered.

It is intended by the plaintiff, by this stipulation, merely to waive objections to the aforesaid tariffs, rates, schedules and classifications, and the said schedule of reasonable maximum rates or charges for the transportation of freight and cars on each of the railroads in the State of Iowa, together with the classification of freight prepared by the Board of Railroad Commissioners of the State of Iowa, on the ground that the same have not been duly certified to by the Secretary of the Interstate Commerce Commission under the seal thereof, or by the said Board of Railroad Commissioners of the State of Iowa, and to waive the necessity for such certifications.

Signed in duplicate this 23rd day of January, 1908.

FRANK E. BISHOP,
ARTHUR R. WELLS,
Attorneys for Defendant.
SULLIVAN & SQUIRES,
Attorneys for Plaintiff.

D'ft's Exhibit 8.

2 And afterwards, on the 7th day of February, 1908, certain proceedings were had in said cause, in the words and figures llowing, to-wit:

In the District Court of Custer County, Nebraska.

H. FRED MILLER, Plaintiff,
vs.
ICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

* * * * * * *

Came now a jury in said cause consisting of W. W. Barnes, Wm. ckbee, George Greenwalt, J. O. Jackson, John Leonard, Wm. borne, Sr., Frank Weisenrieder, T. T. Winchester, Harry Woodf, J. F. Carlos, Hugh Kennover and J. H. Anderson, twelve good l true men of said county, who were called, examined, impanelled l sworn to try said cause. Said cause was then stated to said jury attorneys for plaintiff and for defendant. Evidence in said cause s then taken. Said cause was then argued to said jury by counsel the respective parties.

FEBRUARY 8, 1908.

Said cause coming on further to be heard, the said jury was duly instructed by the Court, in the words and figures following, to-wit:

In the District Court of Custer County, Nebraska.

H. FRED MILLER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

Instructions to the Jury Given by the Court on His Own Motion.

23 No. 1. Given.

You are instructed that the plaintiff in his petition alleges in substance that the defendant is a corporation, organized and existing under the laws of the state of Iowa, and was organized for the purpose of owning, operating and controlling a line of railroad from Chicago, Illinois, westward through the state of Iowa and through the state of Nebraska; that defendant owns and operates and controls a line of railroad through said states passing through the town of Cambria, Iowa, to and through the town of Broken Bow, Nebraska, and as such is and has for a number of years past been engaged in the transportation of stock, merchandise, freight and persons over said line for hire. That on September 18, 1906, this plaintiff and his brother Luther Miller at Cambria, Iowa, placed in charge of said defendant company two horses to be transported together in the same car by it from Cambria, Iowa to the said Luther Miller at Broken Bow, Nebraska. That one of said horses was a stallion, valuable for breeding purposes, purchased and owned by plaintiff for the purpose of selling again to others desiring a horse for breeding purposes. That said horses belonged to that family of horses known as coach horses and was registered by and in the records of the American Registry Association; was a horse of perfect breeding and pedigree and was a perfect bred coach stallion, free from blemish and was of the reasonable value of $2000.00 at Broken Bow, Nebraska and upon the general market.

That at the time plaintiff delivered said stallion to defendant, defendant agreed and undertook to transport said horses from said point in Iowa to Broken Bow, Nebraska, and charged plaintiff the usual tariff or freight therefor, and plaintiff agreed to pay the same in consideration of the transportation of said horses. Plaintiff further states that he did not accompany said car of horses and
24 did not attend said shipment of horses, nor did any other person for him and in his behalf do so. That thereafter, while in transit and somewhere in the vicinity of the town of Pacific Junction, Iowa, the exact place plaintiff is unable to state, but is informed and believes was between the towns of Hastings and Pacific Junction in the state of Iowa, the defendant company carelessly and negligently caused and permitted the car in which said horse was

being transported to become and be on fire and said horse was therein and thereby suffocated and burned; and by reason of said fire carelessly and negligently caused and permitted as aforesaid, said horse to become frightened and panic stricken and he lunged about and against the sides of the car and by reason thereof became bruised and injured; that he was suffocated and partly strangled by the smoke and his lungs scorched and burned; that during said fire and immediately prior thereto and thereafter said train of which said car formed a part, was by the agents and employés of defendant company run rapidly for some distance and at a point, the exact location of which is unknown to plaintiff, but which he is informed and believes was near Pacific Junction, Iowa, said train was carelessly and suddenly stopped while going at a great speed and said horse by reason thereof was thrown against the side and floor of said car and thereby injured. Because of said injuries, suffocation and bruising due to the negligence and carelessness of said defendant, as aforesaid, said horse died while in the car and in transit as aforesaid as the result of the carelessness and negligence of the defendant company, and because of the injuries received and suffered by him as hereinbefore charged plaintiff is unable to say just where said horse died, but he is informed and believes and charges the fact to be that said horse died while so in transit somewhere between the station
25 of Lincoln, Nebraska, and Broken Bow, Nebraska. By reason of the premises the plaintiff has been damaged in the sum of $2000.00, which amount plaintiff shortly thereafter claimed or demanded of defendant, but defendant has refused to pay the same or any part thereof. Wherefore plaintiff prays judgment against the defendant for the sum of $2000.00 with 7 per cent. interest from September 18, 1906, and for costs.

Defendant excepts. B. O. Hostetler, Judge.

No. 2. Given.

The defendant for answer to the petition of plaintiff admits that it is a corporation organized under the laws of Iowa and that it operated a line of railroad in the states of Iowa and Nebraska at the time stated in the petition. Denies that the plaintiff was the owner of or interested in the horse referred to in the petition. Defendant further alleges that the shipment of said horse was made upon a written and printed contract entered into between the shipper and the company by which it was agreed that the shipper, or some person in charge for him, would care for, attend to, water and provide for the physical comfort of said horse throughout the shipment, and that he would bed the car and attend to the horse therein, and if said bedding took fire and said horse was injured thereby, it was due to the fault and carelessness and neglect of duty on the part of the plaintiff or the person in charge of said shipment for him, or to the nature and propensities of the said animal himself, and was not due to nor the result of the carelessness neglect or failure of duty on the part of defendant. The contract for the shipment of said horse and the actual transportation of him was from Cambria, Iowa, to Broken

Bow, Nebraska, and in making said contract of shipment it was agreed between the plaintiff and the defendant that the rate of
26 charge on said shipment should depend upon and be proportioned to the value of said horse, which value was to be fixed and declared by the plaintiff, and on said value he was advised of the rate to be charged, and that a greater rate would be charged for a greater value, and in pursuance of said agreement the plaintiff placed a value of $100.00 upon said horse upon which valuation the freight rate was determined and obtained, and because of such low valuation plaintiff received the benefit of the lower rate, according to the tariffs and classifications of the defendant, published and in force according to law at the time, whereby said plaintiff is bound by said valuation, and in no event could he recover more than $100.00 for the injury or loss of said horse in shipment.

Further answering the defendant denies each and every allegation in said petition except as herein stated.

Defendant excepts. B. O. Hostetler, Judge.

No. 3. Given.

Plaintiff for reply to the answer of defendant denies each and every allegation of new matter in said answer contained. Plaintiff alleges that when he shipped said horse as set forth in his petition he did not agree with the defendant, through himself or any other person, or agent, upon what the valuation of said horse was at the time of shipment, or at any other time, and plaintiff never authorized or empowered any other person or agent to agree for him as to what the valuation of said horse was at the time of said shipment or any other time. Plaintiff alleges that he never agreed with the defendant at the time of shipment that the defendant might be relieved of any liability which it might incur with reference to or in connection with said shipment of said horse, or waive, release or discharge the defendant from any such liability, nor did he at any time authorize any
27 other person or agent to waive, release or discharge said company from such liability, and plaintiff never had any knowledge that any person or agent for him had agreed with defendant upon any valuation of said horse at the time of said shipment, or at any other time, or had for him released or discharged said defendant from liability which it might incur with reference to or in connection with said shipment of said horse. Plaintiff denies that he ever through himself or any other person agreed with the defendant upon any valuation of said horse, or waived, discharged or released said defendant from any liability with reference to the shipment of said horse, or in connection with the same.

Defendant excepts. B. O. Hostetler, Judge.

No. 4. Given.

You are instructed that the burden of proof is upon the plaintiff and he must satisfy you by a preponderance of the evidence of the truth of all the material allegations of his petition; and if you find

that the evidence is evenly balanced or that it preponderates in favor of the defendant, then your verdict should be for the defendant.

Defendant excepts. B. O. Hostetler, Judge.

No. 5. Given.

By a preponderance of the evidence is meant the weight of the evidence—that which on the whole of the evidence when fully, fairly and impartially considered by the jury, produces the stronger impression on the minds of the jury and is more convincing as to its truth when weighed against the evidence in opposition thereto.

Defendant excepts. B. O. Hostetler, Judge.

28

No. 6. Given.

You are instructed that if the plaintiff satisfies you by a preponderance of the evidence that plaintiff was the owner of the stallion in question, and that such stallion was shipped over defendant's railroad, and that the defendant carelessly negligently failed to transport such stallion and conducted itself so negligently and carelessly in and about the conveying and transporting of the same that said stallion was injured and died, and that plaintiff was thereby damaged, then your verdict will be for the plaintiff. If plaintiff fails to so satisfy you, then your verdict will be for the defendant.

Defendant excepts. B. O. Hostetler, Judge.

No. 7. Given.

You are instructed that the term negligence used in these instructions may consist in either failing to do what, under the circumstances, a reasonable and prudent man would ordinarily have done, or in doing what he would not have done.

Defendant excepts. B. O. Hostetler, Judge.

No. 8. Given.

You are instructed that when a railroad company undertakes to carry livestock for hire, the fact that it does so establishes its relation as a common carrier with the duties and obligations which grow out of it.

Defendant excepts. B. O. Hostetler, Judge.

No. 9. Given.

You are instructed that under the laws of this state a contract between a shipper and a common carrier which by its terms limits the liability of the carrier in the transportation of stock, or relieves it entirely or partially from damages for injury or loss to, such

29 stock, resulting from the negligence and carelessness of such carrier is void and of no effect.

Defendant excepts. B. O. Hostetler, Judge.

No. 10. Given.

You are instructed that a railroad company in the carriage of personal property is subject to the liability of a common carrier and must answer for all losses not occasioned by the act of God, or the public enemy, or the inherent propensities of the animal and cannot in this state by special contract limit or relieve itself from this liability. The fact that the contract was for the carriage of goods from a point in the state of Iowa to a point in Nebraska does not change the rule.

Defendant excepts. B. O. Hostetler, Judge.

No. 11. Given.

You are instructed that the clause in the contract fixing the value of the horse in question at $100, is not binding upon the parties to this litigation. Such stipulation is by the laws of this state held void, because against the public policy of the state.

Defendant excepts. B. O. Hostetler, Judge.

No. 12. Given.

You are instructed that while the contract of shipment provides that a caretaker shall accompany and care for the stallion in question, during the transportation of the same, still the evidence shows that no caretaker accompanied the same. You are instructed that under such circumstances it was the duty of the defendant to properly care for such horse during said shipment, and if the defendant was guilty of negligence in transporting such animal, and the same was injured, then defendant would be liable, although the plaintiff failed to comply with the contract by sending a caretaker with the horse.

Defendant excepts. B. O. Hostetler, Judge.

No. 13. Given.

You are instructed that if from the evidence in the case you find for the plaintiff, you will allow him the fair, reasonable market value of the stallion at Broken Bow at the time he should have arrived there alive, with 7 per cent. interest from September 18, 1906, to February 3, 1908, the first day of this term of court.

Defendant excepts. B. O. Hostetler, Judge.

No. 14. Given.

You are the judges of the credibility of the witnesses and the weight to be given to the testimony of each and all of them. In determining the issues in this case you should take into consideration the whole of the evidence, giving to the several parts thereof such weight as you think they are entitled to. And in determining the weight to be given to the testimony of the several witnesses, you

should take into consideration their interest in the event of the case, if any such is proved, their conduct and demeanor while testifying, their apparent intelligence, fairness and bias, if any such appears, the reasonableness of the story told by them, and all the evidence and circumstances, tending to corroborate or contradict such witness, if any such is proved, and give to the testimony such weight as you think it entitled to.

Defendant excepts. Bruno O. Hostetler, Judge.

BRUNO O. HOSTETLER, *Judge*.

31 The Court instructed said jury as above; the defendant filed the following

Instructions Requested by the Defendant.

In the District Court of Custer County, Nebraska.

H. FRED MILLER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

The defendant requests the Court to give to the jury the following instructions:

One. You are instructed that under the pleadings and evidence in this case, the plaintiff is not entitled to recover and your verdict should be for the defendant.

(Refused. Defendant excepts. B. O. Hostetler, Judge.)

Two. You are instructed that under the evidence in this case it is proven that under the tariffs which had been duly published and filed with the Interstate Commerce Commission by the defendant, that the plaintiff, when shipping the horse in question, was bound to declare to defendant's agent, the true value of the said animal. That the declared value, as fixed by the plaintiff's agent was One Hundred Dollars ($100.00) and that the plaintiff is not now entitled to show or prove that the said animal was of greater value than One Hundred Dollars ($100.00) and that the act of the plaintiff in billing said horse as valued at One Hundred Dollars ($100.00), when in fact it was of greater value, was fraudulent as to the defendant and was forbidden by the Interstate Commerce Act and constituted such fraudulent underbilling as relieves the defendant from liability for the loss of the said animal and the plaintiff is not entitled to recover in this action.

(Refused. Defendant excepts. B. O. Hostetler, Judge.)

32 Three. You are instructed that it has been proven that the defendant is a common carrier engaged in interstate commerce and as such, is subject to the act of Congress approved February 4th, 1887 and the acts amendatory thereof and supplemental thereto; that the shipment in this case moved from Cambria, Iowa to Broken Bow, Nebraska and was an interstate shipment and as such, is subject to the acts of Congress in relation thereto and

the rights and obligations of the plaintiff and the defendant are determined by the said acts of Congress. That the evidence shows that the tariffs governing said shipment and the rates and charges to be charged therefor and the terms and conditions on which said animal was transported have been duly published and filed by the defendant with the Interstate Commerce Commission and duly posted as required by law in the depot or station of the defendant company at Cambria, Iowa.

You are therefore instructed that the rights of the parties are to be determined by the provisions of the said tariffs and classifications and that under the said tariffs and classifications, it is provided that the liability of the defendant for the loss or damage to the animal in question was limited to One Hundred Dollars ($100.00).

You are instructed that the provisions of the said tariffs are binding upon the plaintiff and he is conclusively presumed to have been advised and informed of the terms thereof and that in causing or allowing the said animal to be shipped and transported at the freight rate which was charged in this case, the plaintiff is barred and estopped from claiming said animal was worth more than the sum of One Hundred Dollars ($100.00) and he is not entitled to recover any amount in excess thereof.

(Refused. Defendant excepts. B. O. Hostetler, Judge.)

33-36 Fourth. You are instructed that the evidence shows that the shipment of said horse was made under a written or printed contract which was duly executed and signed by the agents of the plaintiff and the defendant. That under the said contract of shipment, it was agreed between the plaintiff and the defendant that the rate of charge for the said shipment should depend upon and be proportionate to the value of said horse, which value was to be fixed and declared by the plaintiff and on said value, that he was advised of the rate to be charged and that greater charge would be charged for a greater value, according to the provisions of the tariffs of the said defendant company published and filed with the Interstate Commerce Commission and posted in its station as required by law. That in pursuance of the said agreement and with the provisions of the said tariffs, the plaintiff placed a value of One Hundred Dollars ($100.00) upon said horse, upon which valuation the freight rate was determined and plaintiff obtained benefit of the lower rate rather than the higher rate based on the higher valuation according to the tariffs and classifications of the defendant published and in force according to law at the time of the said shipment and that the plaintiff is now bound by said valuation and in no event can he recover more than One Hundred Dollars ($100.00) for the injury or loss of the said horse during said transportation.

(Refused. Defendant excepts. B. O. Hostetler, Judge.)

* * * * * * *

37 ARTHUR R. WELLS,
C. L. GUTTERSON,
Att'ys for Defendant.

Said jury having been so instructed, retired to deliberate upon their verdict.

And afterwards, on said 8th day of February, 1908, said jury returned into Court with their verdict in said cause, which was in the words and figures following:

Verdict of Jury.

February Term, A. D. 1908, to-wit, February 8th, 1908.

THE STATE OF NEBRASKA,
Custer County, ss:

H. FRED MILLER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

We, the jury in this case, being duly impanelled, sworn and instructed do find and say that we find for the plaintiff, and assess the amount of his recovery at $1200.00, with interest from Sept. 18, 1906, at 7% to Feb. 3, 1908. Interest $115.50. Total $1315.50.

GEORGE GREENWALT, *Foreman.*

38 And afterwards, on the 8th day of February, 1908, there was filed in the office of said Clerk, in words and figures following, a certain

Motion for a New Trial.

In the District Court of Custer County, Nebraska.

H. FRED MILLER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

The defendant moves the Court to set aside and vacate the verdict of the jury and grant a new trial for the following causes affecting materially the substantial rights of the defendant:

First.

That under pleadings and evidence in this case the plaintiff was not entitled to recover and the verdict should have been for the defendant.

Second.

That under the pleadings and evidence in this case, the plaintiff was not entitled to recover a verdict in excess of One Hundred Dollars ($100.00) and interest thereon at 7 per cent from the 18th day of September, 1906 to the 3rd day of February, 1908.

Third.

The verdict is not sustained by sufficient evidence.

Fourth.

The verdict is contrary to law.

Fifth.

Errors of law occurring at the trial and duly excepted to by the defendant.

Sixth.

Excessive damages appearing to have been given under the influence of passion or prejudice.

39 Seventh.

That the damages allowed by the jury are excessive and are not sustained by the evidence in the case.

Eighth.

The evidence shows that the defendant is a common carrier engaged in interstate commerce and as such is subject to the acts of Congress approved February 4th, 1887 and the acts amendatory thereof and supplemental thereto. That the shipment in this case was interstate. That the tariffs of the defendant governing said shipment had been duly published and filed with the interstate commerce commission and posted in defendant's depot at Cambria, Iowa, at and before the time of the shipment of the said horse. That the act of the plaintiff in causing or allowing said horse to be shipped at the rate charged when in fact, the said horse was of greater value than One Hundred Dollars ($100.00), constituted a misdemeanor and fraudulent underbilling in violation of the interstate commerce acts and deprives the plaintiff of his right to recover for the loss of said horse.

Ninth.

That the evidence in the case shows without dispute that the defendant was a common carrier engaged in interstate commerce and as such was subject to the act of Congress approved February 4, 1887 and the acts amendatory thereof and supplemental thereto and that the said stallion was received for shipment and transportation under the provisions of the tariffs of the defendant which had been duly published and filed with the interstate commerce commission and posted in the depot of the defendant at the point of origin. That under and by virtue of the provisions of the said tariffs, it was provided that the rate of charge for said shipment should depend upon and be proportioned to the value of said stallion, which
40 value was to be fixed and declared by the plaintiff and on said value he was advised of the rate to be charged

and that a greater rate would be charged for a greater value, and in pursuance of said provisions, the plaintiff caused and permitted said horse to be transported at a rate based upon a valuation of One Hundred Dollars ($100.00). That by his act in allowing said horse to be transported at the rate of charge which was demanded and collected on said shipment, the plaintiff became bound by the provisions of the tariffs which provided that the liability of the defendant in case of the loss or injury of said horse should not exceed the sum of One Hundred Dollars ($100.00) and the plaintiff was not entitled to recover in this action a sum in excess of One Hundred Dollars ($100.00) with the lawful rate of interest thereon from the date of shipment to the 1st day of this term of court.

Tenth.

The Court erred in holding that the rights and obligations of the parties in this case were governed and determined by the laws of the State of Nebraska and in holding that the rights and obligations of the parties were not determined and governed by the laws of the United States.

Eleventh.

There was no testimony in the record tending to show that said horse was valuable for any purposes other than for draft or driving purposes and there is no evidence in the record which tends to support the amount of damages allowed by the jury.

Twelfth.

The Court erred in refusing to give the first instruction requested by the defendant.

Thirteenth.

The court erred in refusing to give the second instruction requested by the defendant.

41 Fourteenth.

The Court erred in refusing to give the third instruction requested by the defendant.

Fifteenth.

The Court erred in refusing to give the fourth instruction requested by the defendant.

Sixteenth.

The Court erred in refusing to give the fifth instruction requested by the defendant.

Seventeenth.

The Court erred in refusing to give the sixth instruction requested by the defendant.

Eighteenth.

The Court erred in refusing to give the seventh instruction requested by the defendant.

Nineteenth.

The Court erred in refusing to give the eighth instruction requested by the defendant.

Twentieth.

The Court erred in giving the first instruction.

Twenty-first.

The Court erred in giving the second instruction.

Twenty-second.

The Court erred in giving the third instruction.

Twenty-third.

The Court erred in giving the fourth instruction.

Twenty-fourth.

The Court erred in giving the fifth instruction.

Twenty-fifth.

The Court erred in giving the sixth instruction.

42 Twenty-sixth.

The Court erred in giving the seventh instruction.

Twenty-seventh.

The Court erred in giving the eighth instruction.

Twenty-eighth.

The Court erred in giving the ninth instruction.

Twenty-ninth.

The Court erred in giving the tenth instruction.

Thirtieth.

The Court erred in giving the eleventh instruction.

Thirty-first.

The Court erred in giving the twelfth instruction.

Thirty-second.

The Court erred in giving the thirteenth instruction.

Thirty-third.

The Court erred in giving the fourteenth instruction.

Thirty-fourth.

The Court erred in refusing to give the ninth instruction requested by defendant.

And the defendant requests that in case this Motion for a new trial is over-ruled, the defendant be allowed 40 days from the rising of the Court in which to prepare and file its Bill of Exceptions.

ARTHUR R. WELLS,
C. L. GUTTERSON,
Att'ys for Defendant.

And afterwards, on the 14th day of February, 1908, there was entered of record in the office of said Clerk, certain proceedings and a decree in said cause, in words and figures following, to-wit:

13 In the District Court of Custer County, Nebraska.

H. FRED MILLER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

And now on this 14th day of February, 1908, this cause came on further to be heard upon the motion of the defendant for a new trial. The Court being fully advised in the premises doth overrule said motion, to which defendant duly excepts, and is given forty days from the rising of the Court in which to prepare and file its bill of exceptions in said cause.

It is therefore ordered, adjudged and decreed by the Court that the plaintiff have and recover of the defendant, the Chicago, Burlington & Quincy Railway Company, the sum of One Thousand Three Hundred and Fifteen Dollars and Fifty Cents ($1315.50) with interest thereon from this date at 7 per cent per annum until paid, and the further sum of One Hundred Twelve Dollars and Fifteen Cents ($112.15), the costs of this action.

STATE OF NEBRASKA,
Custer County, ss:

I, Geo. B. Mair, Clerk of the District Court in and for said County and State, do hereby certify that the foregoing is a full, true and correct transcript of the record and proceedings, together with the final judgment of the court, in the case of H. Fred Miller against the Chicago, Burlington & Quincy Railway Company, as fully as the same remains on file and of record in my office.

I further certify that the bill of exceptions attached hereto is the original bill of exceptions filed in said cause.

I further certify that the February, 1908, term of said District Court has not yet adjourned sine die.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said District Court, at Broken Bow, Nebraska, this 20th day of May, A. D. 1908.

44 [SEAL.] GEO. B. MAIR, *Clerk*.

Endorsed: 15794. Miller v. C. B. & Q. Ry. Co. Transcript. Supreme Court of Nebraska. Filed Jul- 30, 1908. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bill of Exceptions in the words and figures following, to-wit:

In the District Court of Custer County, Nebraska.

H. FRED MILLER, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Appearances:

Sullivan & Squires, for Plaintiff.
A. R. Wells & C. L. Gutterson, for Defendant.

Be it remembered, That on the 7th day of February, 1908, that being one of the days of the Regular February, 1908, Term of the District Court of Custer County, Nebraska, the above entitled cause came on for trial before the Court and a Jury, the Hon. Bruno O. Hostetler, Judge presiding. That to maintain the issues joined, the said parties offered and introduced the following oral and documentary evidence, made their objections thereto, and took the exceptions to the rulings thereon as hereinafter fully set forth:

* * * * * * *

45 F. A. GARLAND, called and sworn as a witness for the plaintiff, testified as follows, examined by Mr. SQUIRES:

1 Q. Where do you now live?
A. Foster, Montana.
2 Q. Were you in Iowa in September, 1906?
A. Part of the month, yes, sir.
3 Q. Were you in Iowa on the 18th or 19th of September, 1906?
A. Yes, sir.

46 4 Q. Where were you on those days?
A. On the 18th day I loaded an emigrant car, a partner of mine, Mr. Eckelberry, and shipped to Foster, Montana.

5 Q. Where did you start to ship from?
A. Derby, Iowa.
6 Q. What were you shipping?
A. Emigrant car, we had some stock in it, had a team of mules.
7 Q. Over what road?
A. C. B. & Q.
8 Q. When did you start from Derby, Iowa?
A. The evening of the 18th.
9 Q. Who was in the car with the goods, if anybody?
A. I was.
10 Q. Was anybody else in the car?
A. Mr. Eckelberry was.
11 Q. Where was your car with reference to the engine of that train?
A. I can't say until after we got to Creston, when we left Creston we were next to the tender.
12 Q. Did you remain in the car as long as you were in Iowa?
A. Yes, sir.
13 Q. Did you ever see the horse Deo Dewey?
A. Yes, sir.
14 Q. Where did you first see this horse?
A. At Creston, Iowa.
15 Q. Was this horse in the same train that you were?
A. Yes, sir.
16 Q. Where was the car in which the horse was with reference to your car?
A. Right in the rear of the car I was in.
47 17 Q. Did you look into this car where the horse was?
A. Well, at Creston they stopped our cars to make up a train and we laid over there about two hours and naturally we would look into the car and I saw this horse.
18 Q. How many horses were there in this car?
A. Two.
19 Q. Were they stallions?
A. Yes, sir.
20 Q. What sort of a car were they in?
A. An ordinary box car.
21 Q. Was there any opening in any part of the car?
A. The end door was open and the side doors.
22 Q. Which end door?
A. The one next to the engine.
23. The front of the car?
A. Yes.
24 Q. And you say the side doors were open some?
A. Yes.
25 Q. What part of the car was this horse in?
A. He was in the west end of the car.
26 Q. What end with reference to the engine?
A. Well, that was nearest the engine.
27 Q. Did you notice any bedding in the car?

A. Yes, there was more or less bedding in there, I don't know exactly how much there was.

28 Q. Under the horse?

A. Yes, sir.

29 Q. Now, in the evening of September, what, if anything, did you notice peculiar about the train?

A. Well, I didn't notice anything particular until we got out somewhere near Pacific Junction and there I smelled fire and
48 I thought our car was on fire because I had seen the sparks from the engine a little while before that and I was afraid our car would catch fire and I got up and shut the door; I would say probably about 8 o'clock I smelled fire, Mr. Eckelberry was in the car with me, I made the remark "I believe our car is on fire," we looked around the bedding but couldn't see any fire, we run probably a few seconds and I got another whiff of smoke and I says "there must be a fire somewhere and I stuck my head out and I saw this car was on fire, I could see smoke and more or less of a blaze come out of the side of the door, of course, that scared me, I didn't know hardly what to do, and Mr. Eckelberry climbed up on top with my assistance and went up and told the engineer and he came back and I helped lift the water out of the barrel in our car.—

30 Q. How much water was there in the barrel?

A. Well, it was pretty full, because we filled it at Creston, I lifted the water out to him and he took it back and threw it into the car until we emptied our barrel and I climbed up on the car myself, got up there and I think it was the head brakeman, all three of us carried water out of the tender to put it out with, we wasn't making any progress and I went to the engineer and told him he must stop his train or they would set the whole train a fire, he said I can't stop until I get to the top of the grade; I finally told him "if you don't stop I will cut the air, because I don't want my car of merchandise to burn up; he finally stopped the train, may be 10 or 15 minutes after.

31 Q. In the mean time, what were you and your partner doing?

A. Trying to put out the fire, but we couldn't make any headway because of the motion of our car and the motion of the car the horses were in, we couldn't throw much water in the end
49 door.

32 Q. Where did you get this water?

A. We got it out of our car and finally out of the tender.

33 Q. Where did you throw it?

A. Threw it in the end door.

34 Q. Did you look into this opening in the freight car then?

A. When we were throwing in the water?

35 Q. Yes.

A. Yes, of course, I couldn't help but see, because we would go up within a few feet of the car.

36 Q. As far as you could observe at that time in the car, what could you see?

A. It was all ablaze in that end of the car.

37 Q. What did you observe about smoke and steam?

A. Well, of course, there was more or less smoke with the fire.

38 Q. What were the horses doing?

A. They were making lots of noise in there, this horse was, he was rearing around there.

39. Could you tell why he was doing this, from the appearances?

A. Naturally he was scared from the fire.

40 Q. Now then, you say soon afterwards they stopped?

A. Yes.

41 Q. Was that after you got to the top of the grade?

A. I suppose so, the engineer said he wouldn't stop until they got to the top of the grade.

42 Q. Going up the grade, what did you observe about the smoke coming from the engine, if anything?

A. I noticed lots of sparks coming from the engine.

43 Q. Did you know what the character of the grade was that they were going up?

A. No, I don't.

50 44 Q. When they stopped the engine who went back to the car where the horses were?

A. Mr. Eckelberry and myself and the engineer and the brakeman and I think the fireman, I am not sure though about the fireman.

45 Q. What did you do when you got back there?

A. Well, we got so we could put on the water, we finished carrying water after the train had stopped, threw it up into the end of the car, so we could get into the car, when we got into the car there was two barrels of water in the car, very soon they had it put out.

46 Q. How many of them were working putting the fire out?

A. There was three of us.

47 Q. After the car had stopped and you went back there, what did you observe in the car at that time with reference to the fire and the condition of the car?

A. Well, after we went back there, of course, it was still afire until we got into the car we started to throw on more water.

48 Q. What did you observe about the appearance of this horse?

A. He was very much frightened, he was all covered with sweat and the water was dripping off of him, he was breathing very hard, well, I never heard an animal breathe like that in my life before.

49 Q. Did you hear the breathing before you went back there?

A. We could hear it in the next car.

50 Q. That was before the train stopped you could hear it from your car?

—. ——.

51 Q. Describe as well as you can how the horse breathed and how he looked.

51 A. Well, when we got in the car after we got the fire out he he was standing there in a rigid position with his head down and he was breathing like he had been run 4 or 5 miles on a dead run, sides heaving in and out.

52 Q. Was his nostrils distended?

A. Yes, they were much larger and real red.

53 Q. Describe as well as you can the noise you heard before the train stopped connected with the horses breathing.

A. Well, we could hear the horse breathe, that is, towards the latter end, just before we stopped.

54 Q. What sort of noise did he make?

A. Well, he would breathe like any animal would when he was breathing hard.

55 Q. Wheezing?

A. Yes.

56 Q. You say the horse was covered with lather and sweat?

A. Yes, sir.

57 Q. What did you do after the fire was put out?

A. Well, after we put the fire out and looked at the horse the engineer made the remark, or I made the remark to the engineer——

Objected to as hearsay and not binding on the defendant. Sustained—Exception.

58 Q. Did the horse appear to you to be sick?

Objected to as leading and suggestive. Sustained—Exception.

59 Q. What did you do after the fire was out, go back into the car?

A. Yes, sir.

60 Q. Did the train start then?

A. Yes.

61 Q. Now, then, where did you go from there?

52 A. That was the last place I remember of, the next place was Lincoln, Nebraska.

62 Q. Did you see the horse again before you got to Lincoln?

A. No, sir.

63 Q. On the road from there to Lincoln could you hear the horse breathe?

A. Yes, sir.

64 Q. What time did you get to Lincoln?

A. Some time about daylight, if I remember.

65 Q. When you go- to Lincoln, what did you do?

A. We laid there in the yard and this car that contained this horse stood right there next to our car for, I would say, an hour or an hour and a half.

66 Q. Who came there during that time?

A. The yardmaster came there and took my name and Mr. Eckelberry's name and I think there was a veterinary came there.

67 Q. What did he do?

A. I don't know, they took the car away and that is the last time I seen it.

68 Q. Did you see the horse at Lincoln before the car left?

A. Yes, sir.

69 Q. What did you observe about the appearance of the horse there?

A. Well, he was standing there, kind of against the side of the car in a very rigid position, his limbs seemed to be stiff, of course, I

didn't see him move, his head was down and there was film scattered over the car, probably came out of his nostrils.

70 Q. What was the appearance of his nostrils?

A. They were about twice the normal size and he was still breathing very hard.

71 Q. Describe the character of the breathing, what
53 & 54 sort of a noise, if any, he made.

A. Well, it was a wheezing noise, acted to me like it was almost impossible for him to get his breath.

72 Q. Did you observe the appearance of his eyes?

A. Yes, they were glassy.

73 Q. Do you know whether he was covered with sweat at that time or not?

A. No, I don't think he was at that time.

74 Q. What was the appearance of the horse as to whether he was sick?

Objected to as leading and suggestive.

Sustained—Exception.

* * * * * * *

79 Q. Did you notice the other horse that was in the car?

A. Yes, sir.

80 Q. What sort of a looking horse was that?

A. He was a little smaller horse.

81 Q. Were they both stallions?

A. Yes, sir.

* * * * * * *

55 101 Q. Where was it you first noticed the car?

A. It was somewhere near Pacific Junction; I am not positive as to the station.

102 Q. And when you say it was 10 minutes before the engineer stopped, you are just estimating it, you didn't take any time, or did you?

A. No, I didn't look at my watch.

103 Q. Seemed a long while?

A. Well, we emptied the barrel of water out of my car and carried some water out of the tender.

104 Q. The engineer did stop the train when he got to the top of the grade?

A. Yes.

* * * * * * *

56 118 Q. When you observed the fire in the bedding, how much of the bedding was on fire?

57 A. I can't say when I first saw it, when we put it out it was practically all burned up.

Witness excused.

LUTHER MILLER, called and sworn as a witness for the plaintiff, testified as follows:

Examined by Mr. SULLIVAN:

119 Q. What relation are you to the plaintiff?
A. A brother.
120 Q. Where does the plaintiff live?
A. Cambria, Iowa.
121 Q. Was you acquainted, in his life time, with this horse, Deo Dewey?
A. Yes, sir.
122 Q. Do you know who was the owner of that horse on September 18, 1906?
A. Yes, sir.
123 Q. Who was?
A. Fred Miller.
124 Q. Do you know anything about the shipment of the horse, was you there when it was loaded?
A. No, I wasn't there the time he was loaded, I was at home.
125 Q. Was you here in Broken Bow the time the horse got here?
A. Yes, sir.
126 Q. Did you see here in Broken Bow, in a car on defendant's line, a dead horse about that time?
A. Yes, sir.
127 Q. What date did you see that horse?
A. Some time after the middle of September, possibly along about the 21st or 22.
128 Q. Where did you see him?
A. I seen him at the door, here in town.
129 Q. Can you say that the horse you saw here then was this horse, Deo Dewey, owned by your brother?
58 A. Yes, sir.
130 Q. You say you was at Cambria when he was shipped?
A. Yes.
131 Q. Do you know whether there was another horse shipped with him?
A. Yes.
132 Q. What other horse was shipped with him?
A. We shipped a brown saddle stallion with him.
133 Q. Was that horse in the car with the dead horse here?
A. Yes.
134 Q. Did you know that horse before he was shipped?
A. Yes.
135 Q. Who owned that horse?
A. Well, I owned him.

* * * * * * *

59 146 Q. What has been the nature of your business the last 10 or 12 years with horses?
A. I have been shipping horses to market, been handling stallions of all classes.

147 Q. Have you been buying and selling them?
A. Yes.
148 Q. Upon what markets have you been accustomed to placing horses?
A. Well, the market horses, shipping horses, I have been placing in Chicago and Iowa, and I have bought some for the government.
149 Q. To what extent have you been accustomed to be among expert horsemen and heard them discuss horses?

Objected to as immaterial. Overruled—Exception.

A. Well, I have been among some of the best horsemen in the United States, discussed horses with them.

Objected to as a conclusion. Sustained—Exception.

150 Q. No, have you been among expert horsemen and what was their business?
A. In Chicago, handling high class driving horses, draft horses, carriage horses, road horses.

* * * * * * *

30 153 Q. What number of horses would you find and examine there upon the market?
A. From 600 to 2500 head.
154 Q. And that experience has extended over what period of time?
A. The last four years.

* * * * * * *

61–65 164 Q. Where have you been accustomed to sell them?
A. I have been selling most of them in Nebraska, some in Iowa, some in Missouri.

* * * * * * *

167 Q. Do you know what the value upon the market in this part of Nebraska was of that horse, about the time he arrived here dead?
A. Yes.
168 Q. Now tell the jury what in your candid opinion and judgment was the fair reasonable value of that stallion here.
A. I think it was $2000.00.

* * * * * *

Cross-examination (WELLS):

170 Q. Who attended to the loading and shipping of this horse at Cambria?
A. L. O. Nelson.

* * * * * * *

66 210 Q. Did you pay the freight out here to Broken Bow on this horse?
A. I paid the freight on one of them, the other one I refused to pay.
211 Q. You paid on the live horse?
A. Yes.

212 Q. That was half of the freight that had been charged on both of them?
A. Yes.

213 Q. At the rate they demanded of you?
67–83 A. Yes.

* * * * * * *

84 L. O. NELSON, called and sworn as a witness for the plaintiff, testified as follows:

Examined by Mr. SULLIVAN:

* * * * * * *

85 & 86 388 Q. Did you load the horse at Cambria?
A. Yes.
289 Q. On this trip where he was injured and died?
A. Yes, sir.
390 Q. Was the agent of the defendant company present when the horse was brought in and loaded?
A. He was.
391 Q. Did he see the horse?
A. He did.

* * * * * * *

87 405 Q. You stated you were present at the loading and shipping of this horse for H. Fred Miller.
A. For Luther Miller.
406 Q. Well, whose horse was it?
A. I understand it was H. Fred Miller's.
407 Q. You are the man that looked after the shipping of both horses for both of the Miller boys.
A. Yes.
408 Q. You are a cousin of theirs?
A. Second cousin.
409 Q. Did you sign Luther Miller's name to this paper which the Reporter has marked Defendant's exhibit 2?
A. I did.

SULLIVAN:

410 Q. You say you looked after it for the brothers, as a matter of fact, you had no conversation or understanding and direction of any kind from the plaintiff concerning the shipment of this horse?
A. I did not.
411 Q. Knew nothing about his purpose in shipping the horse?
A. No, sir.

WELLS:

412 Q. Luther Miller is the one that sent you there with these two horses?
A. Yes, sir.
413 Q. And what did he tell you to do?

A. He had ordered a car and told me to load these horses.

88 414 Q. You and Luther Miller had both of you shipped a good many horses back and forth different places?

A. I never, no, sir, he has had them shipped to me and I have loaded them here and shipped to him.

415 Q. You knew it was the regular practice of the railroad company to have live stock contracts signed at the time the shipment took place, did you not?

A. Yes, sir.

416 Q. And in place of signing both men's names you just shipped both horses in Luther's name, is that it?

A. Yes, to him.

SULLIVAN:

417 Q. Will you just tell the circumstances of loading the horses and signing Luther's name to the bill.

A. As we come to town with the horses I rode on a load of hay, leading these horses, and when we got there the train was there and I hurried, and they had a low car stood down there for me, one thing another, and I run up to the agent and made a kick, I says I will not load my horses in that car, it is too low, I won't have their heads all batted up," and the conductor says "well, we are in a hurry, we can't wait." I says I won't load them and when they saw that they sent me another car and they were ready to go in a hurry, didn't want to give me time to even get my horses in and nail the partitions in there.

418 Q. Where was the agent?

A. He was right down there right by the car.

419 Q. Did he see the horse?

A. He did.

420 Q. Tell the circumstances of signing the contract.

A. — run right into the depot when the car was coupled in and signed the contract.

89-93 421 Q. Was it prepared for you?

A. It was.

422 Q. Simply put your name to it and signed it?

A. Yes.

423 Q. How long were you in the building?

A. I don't believe I was there hardly a minute or two.

424 Q. Didn't examine the contract to see what was in it?

A. I did not.

* * * * * * *

428 Q. You had shipped horses before, had you not, for other people?

A. In the same way.

429 Q. You had seen live stock contracts before.

A. I saw this.

430 Q. You knew in a general way what was in them?

A. Yes.

431 Q. You knew they ordinarily require a caretaker to go along

A. No, sir, I don't.

Witness excused.

* * * * * * *

Plaintiff offers in evidence his exhibit "C" being Sec. 2074 of the Code of Iowa. Defendant objects as irrelevant and imma-
94–125 terial. Overruled. Defendant excepts.

Plaintiff rests.

* * * * * * *

126 HAL. BUCKINGHAM, called and sworn as a witness for the defendant, testified as follows:

Examined by Mr. WELLS:

723 Q. Where do you live?

A. Omaha.

754 Q. What is your connection with the Chicago, Burlington & Quincy Railroad Company?

A. Chief clerk in the general freight department, Omaha.

755 Q. Did you hold that same position with the defendant Company in September, 1906?

A. I did.

756 Q. Was the defendant at that time engaged as a common carrier, in interstate commerce?

A. It was.

757 Q. As such you may state how the rates that are to be charged in the transportation of this horse from Cambria, Iowa, to Broken Bow, Nebraska, and the terms and conditions on which the shipments were made were determined.

A. By tarrif-s published by the Chicago, Burlington and Quincy Railway Company.

758 Q. What did your duties consist of on and prior to September, 1906?

A. I have—all the tariffs of the Burlington Line west of the Missouri River are made under my supervision.

759 Q. Do you have in your hands the tariffs that govern the shipments on all the lines of the Burlington, both east and west of the Missouri river?

A. I do.

760 Q. Are the freight rates that were charged for the shipment of these two horses from Cambria, Iowa, to Broken Bow, Nebraska, determined by this tarriff which you have said were published by the company?

127 Objected to as incompetent, not the best evidence.
Overruled. Exception.

A. Absolutely.

761 Q. Are those tariffs filed with the interstate commerce commission?

A. They are.

762. Q. Were they prior to that time?

A. They were.

763 Q. Have you in your possession here in the court room those tariffs which governed this shipment?

A. I have.

764 Q. Will you please state to the court what the tariffs are which governed this shipment.

A. This shipment was covered by the tariff known as C. B. & Q. G. F. O. No. 3417, Interstate commerce Commission No. 5098, it is a joint freight tariff between points in Iowa and Missouri on the C. B. & Q. and K. & W. R. R. west of Burlington, Fort Madison, Keokuk or Alexandria, Mo., and all stations on the B. & M. railroad in Nebraska.

765 Q. Is Cambria, Iowa, one of the stations included?

A. It is.

766 Q. Is Broken Bow, Nebraska?

A. It is.

767 Q. I call your attention to the words "Governed by the Western Classification," what does that signify? In arriving at the rate to be charged would you have to refer to the western classification?

A. We would.

768 Q. Is the paper which the Reporter has marked Defendant's exhibit 9 the tariff from which you have been reading?

A. It is.

769 Q. Now, referring back to the statement that it is governed by the western classification, I will ask you to state what that means.

128 A. In making the freight rate it is necessary to classify the property to be transported——

770 Q. Wait a minute, is this book which you hold in your hand, which is called the western classification No. 40 the classification that was in force at the time this shipment moved?

A. It is and was.

771 Q. Was it filed with the interstate commerce commission as a part of your tariffs?

A. It is.

772 Q. Will you turn to the page and the item in that book and read to the court those provisions which cover the shipment of these horses, giving the page and the item.

A. Page 69 western classification No. 40, first item live stock, Second. Ratings given below are based upon values declared by shippers, not exceeding the following under contract: Each horse or pony, gelding, mare or stallion, mule or jack $100. Where the declared value exceeds the above an addition of 25 per cent will be made to the rate per 100 pounds or car for each 100 per cent or fraction thereof of additional declared value per head; animals exceeding in value $800. per head, or when no value is given, will be taken only by special arrangement. Live stock in car loads limited liability for each animal under contract at values stated above." Then it says "See tariff." that means that the rate on live stock in carloads are always carried in individual and special tariffs. Live stock less

than car-loads, limited liability at values stated above, at the following estimated weights; one horse, gelding, mare or pony, mule or domestic horned animal except bulls, 2000 pounds each—getting down to stallions and jacks, 3000 lbs. each.

773 Q. What are these figures where it says "2 animals 3500 pounds, stallions 3000 lbs. what do those mean?

129 A. It means that owing to considerable difficulty in getting refractory animals to travel over the scales we say they will be charged at a certain weight.

774 Q. Then, no matter what a stallion weighs under the tariff it would be charged 3000 pounds?

A. Yes, sir.

775 Q. What do you have to turn to in order to determine in dollars and cents what was charged this plaintiff in the transportation of these horses?

A. The tariff that I first named, which is marked exhibit 10.

Plaintiff, while insisting that the testimony and facts hereinafter stipulated are immaterial and irrelevant, but for the sake of brevity of the record agrees that the basis of the charge for the shipment of the horses in question was $1.038 per 100 pounds and an estimated weight of 3000 pounds, from Cambria, Iowa, to Broken Bow, Nebraska, making a total of $31.14 for the one stallion which died during transit.

776 Q. The same rate was applicable to the other horse that came in the same car?

A. Yes.

Cross-examination (SULLIVAN):

777 Q. Can you tell briefly and without going into detail what the rate would be upon a carload of horses from Cambria, Iowa, to Broken Bow, Nebraska?

A. I can't, I haven't got that tariff.

778 Q. Can't you tell approximately without the tariff?

A. I think a carload — horses should have been charged $75 or $80.

779. Q. And if these two horses were worth say $800. a piece for shipping the two horses would have cost about $195., wouldn't they?

A. I haven't figured it out.

130 780 Q. Under the schedule you have referred to you say 25% additional for every $100.

A. Yes, sir.

781 Q. For the first 100 $31. and then 25 per cent?

A. When it reaches the value of $500. the sum would be doubled.

782 Q. For every $100 it would add 25 Per cent of the $31?

A. Yes, sir.

WELLS:

783 Q. These tariffs are in all stations of the company, are they?

A. They are, they form a portion of the equipment of every station on the road.

784 Q. They are there open to public inspection?
A. They are.

SULLIVAN:

785 Q. You mean they are published, you don't pretend to say they are there.
A. I mean they are sent there.
786 Q. You don't mean to say there was such a tariff as that posted up in the depot at Cambria.
A. I can't say that, no.

Witness excused.

Defendant offers in evidence Defendant's Exhibit 2, which is the live stock contract under which the shipment moved.

Objected to for the reason it was signed without the knowledge and consent of the plaintiff and plaintiff never knew anything about it and it is incompetent, irrelevant and immaterial to bind him. No ruling for the present.

LUTHER MILLER, recalled (WELLS):

787 Q. You were the agent of the plaintiff, your brother, in shipping these horses?

131 Objected to as calling for a conclusion of law.

788 Q. Did he authorize you to ship these horses out to Broken Bow?
A. Yes, sir.
789 Q. And you told Mr. Nelson to go and ship the horses?
A. I told Nelson to see to it, that is, to go and load the horses.
790 Q. Well, you sent the two horses to the station to be loaded by him.
A. By him and my father I believe.
791 Q. You had shipped a good many horses to different places.
A. Yes, sir.
792 Q. And don't you know that a live stock contract is always executed at the time?
A. Yes, sir.
793 Q. And you knew at the time that Mr. Nelson or some one for you would have to sign a contract before the horses went forward, did you not?
A. Certainly, I knew some one had to do it.
794 Q. You shipped them with your brother's consent, didn't you?
A. Yes, sir.
795 Q. At his direction?
A. Not exactly his direction, no.
796 Q. Well, what do you mean, you didn't run off with the horses, did you?
A. What do you mean by direction?
797 Q. I try to get if you acted for him.
A. Yes.

798 Q. This horse was shipped in your name and the suit was brought in your brother's name.

A. Yes, sir.

799 Q. Do you know how you came to ship this horse for your brother?

A. I shipped him out here to sell him for him.

132 800 Q. I mean with respect to your taking him to the station and having him loaded on the car and looking after the shipment. Were you authorized by your brother to do that?

A. Yes, sir.

SULLIVAN:

801 Q. What was the talk between you and your brother about bringing the horse to Nebraska? *Todd* him you could bring him out here and sell him for a good price?

A. Yes.

802 Q. He had him for sale?

A. Yes.

803 Q. You had horses of your own that you wanted to ship?

A. Yes.

804 Q. You told Nelson and your father to take them down and load them?

A. Yes.

805 Q. You didn't tell them to sign your name to any contract of shipment?

A. No, sir.

806 Q. Didn't tell them to give this horse in at any reduced rate?

A. No, sir.

807 Q. Didn't know they would do that?

Objected to as irrelevant and immaterial.

Overruled. Exception.

A. No, sir.

808 Q. And the plaintiff, your brother, never authorized you or Nelson to your knowledge to claim any reduced rate?

Objected to as irrelevant and immaterial.

Overruled. Exception.

A. No, sir.

809 Q. You never authorized Nelson to do this.

A. No, sir.

133 810 Q. You never authorized Nelson to say to the railroad company that the horse is worth $100 only?

Objected to as irrelevant and immaterial.

Overruled. Exception.

A. No, sir.

811 Q. When did you first learn that your name had been signed to the shipping contract?

A. After I got here.

812 Q. When you found him here dead?

A. Yes.

813 Q. When did you first learn that Nelson had signed your name to it?

A. I learned it here.

814 Q. When did you first learn that some one had inserted in the contract the valuation of the horse at $100?

Objected to as irrelevant and immaterial.

Overruled. Exception.

815 Q. I learned it after I came to Nebraska.

816 Q. After the horse was dead?

A. Yes.

WELLS:

817 Q. Do you remember the amount you paid out for the live horse?

A. I remember something near it, it was between 31 and 2 dollars.

Defendant now renews the offer of exhibit 2 for the purpose of showing that the shipment of the horse in question was made under the provision of the tariffs of the defendant company, which have been offered in evidence and which were filed with the interstate commerce commission, showing that under those tariffs the value of the horses was fixed at $100, and that the liability of the company for the loss or damage to the horse was to be limited to the sum of $100.

134 Plaintiff objects to the offer as incompetent, irrelevant and immaterial and not binding on the plaintiff and the signature was unauthorized. Overruled—Exception.

WELLS: The exhibit is offered for the purpose also to show that plaintiff agreed to send a caretaker with the horse.

COURT: It is not admitted for that purpose. Defendant excepts.

HAL BUCKINGHAM, re-called.

WELLS:

818 Q. I will hand you a paper which the Reporter has marked Defendant's exhibit 11 and ask you to state what that is, if you know from your experience in the line of your employment with the defendant company?

A. It states it is a way bill for the shipment of stallions and applies from Cambria, Iowa, to Broken Bow, Nebraska, dated September 18, 1906.

819 Q. Is that the paper that is made out by the station agent and given to the conductor on the train and passed along?

A. When a shipment is tendered for transportation they make out a way bill to the conductor and is delivered to the station agent at the destination.

820 Q. You notice that shows a corrected charge on there, both as to the rate of freight and the weight of the animals; can you state from your experience and having seen that bill before where those green figures were added on?

A. They were put on by the auditing department for the purpose of arriving at the correct charge for transportation.

821 Q. I notice they are given in the first place as two horses.

A. Yes.

822 Q. It is corrected to stallions.

A. Yes.

135 823 Q. The weight is given in the fi-st place as 3500 pounds.

A. Yes.

824 Q. And corrected to 6000.

A. Yes.

825 Q. Is that made to comply with the tariff?

A. If they were horses that were actually transported, 3500 would be correct, if they were stallions 6000 would be correct.

826 Q. And the rate is corrected and lowered there?

A. Apparently the agent has used what is known as the Mississippi River or Burlington rate in assessing the charge and the auditing department has corrected the figures based on the sum of the locals over Pacific Junction which is a lower charge.

827 Q. Is that the correct way?

A. Yes.

828 Q. And they lowered the rate?

A. They lowered the rate and raised the weight; they also charged for some apples and peaches I believe that were included in the shipment.

829 Q. And the amount named in that waybill for the two horses as charged is correct?

A. $62.28.

830 Q. That is for both horses.

A. For two stallions.

SULLIVAN:

831 Q. Do you know where that change was made from horses to stallions?

A. The shipment doubtless was inspected some place on the road and they discovered they were stallions.

832 Q. What would have been done if one of those had been something else, if they had been colts?

A. I don't know.

833 Q. You have certain items on your schedule as a basis for charging freight.

136 A. Yes.

834 Q. And the basis for charging freight is a good deal higher if they were stallions than if they were horses?

A. Yes.

835 Q. Therefore, somewhere along the line it was changed to stallions.

A. Doubtless at Lincoln where they have an inspector.

Witness excused.

Defendant offers the way bill, marked Defendant's exhibit 11 in

vidence, for the purpose of showing the transportation was under his tariff. Also Def't's Ex. 9 and 10, being freight tariffs.

Received without objection.

J. J. POWERS, called and sworn as a witness for the defendant, estified as follows:

Examined by Mr. WELLS:

836 Q. Where did you live September 18, 1906?

A. Cambria, Iowa.

837 Q. What connection, if any, did you have with the defendant ailway company at that time?

A. Their agent.

838 Q. At Cambria?

A. Yes, sir.

839 Q. You were the agent at the time these two stallions were hipped, were you?

A. Yes, sir.

840 Q. At that time and while you were there, did you have in our office and open to public inspection the tariffs which showed the ates or charges on the lines of the defendant railway company?

A. I think so.

37 841 Q. Well, do you know so?

Objected to as leading.

842 Q. Tell us what you know about it.

A. Well, there was tariffs th-re, Burlington tariffs.

843 Q. How did you arrive at the rate to be put on this way bill, you remember?

A. I don't remember.

844 Q. Is there any other way to get at it than by looking at the ariffs you got there?

A. I could wire the freight agent and ask him about it.

845 Q. That is the general freight office?

A. Yes.

846 Q. And in fixing the rate on this shipment you either referred o the tariff or wired——

A. The general freight agent.

847 Q. You know there were tariffs there, or do you know that?

Objected to as leading, suggestive and a repetition.

Overruled—'xception.

A. I know there was some tariffs there.

848 Q. But you don't know whether you could have figured out rom them the rate on this particular shipment or not.

A. I couldn't say.

Cross-examination (SULLIVAN):

849 Q. You don't know absolutely of any tariff sheets that was pen to the public.

A. They were all there if they wanted to look at them.

950 Q. Do you know where they were?
A. In the tariff files.
851 Q. Part of the private records of the company?
A. Well, they were in the office.
852 Q. You don't know that there was any tariff rate concerning this shipment from there to here or to this locality because
138 you don't know but you had to telegraph the general freight agent to get your instructions.
A. I don't remember which I did.
853 Q. If you telegraphed then that was because there was no tariff rate there?
A. Because there was no rate there or because I didn't consult them.
854 Q. Is it not your impression that you did ask instructions from the general agent?
A. No, sir, I can't remember whether I did or not.
855 Q. Can't you recollect the circumstance of the shipment of these horses? You recollect seeing Nelson there?
A. I expect it was Nelson.
856 Q. You had no personal acquaintance with him?
A. No, sir.

WELLS:

857 Q. How long had you been there that time?
A. About 4 or 5 days.
858 Q. Were there usually notices stuck up in all stations notifying the public that the tariffs are there and can be inspected?

Objected to as no foundation laid. Overruled—Exception.

A. I think they were there. I think I saw them afterwards.
859 Q. Did you put it up after this shipment moved?
A. No, sir.
860 Q. This live stock contract that Nelson signed was already filled out before he signed it there?
A. Y-s.
861 Q. Did he ask you to read it?
A. No, sir.
862 Q. Just signed it?
A. Yes.

SULLIVAN:

139–157 863 Q. Gr-at hurry?
A. Yes, we were in a hurry.
864 Q. You recollect that much?
A. Yes.
865 Q. You recollect you saw the horses?
A. I didn't see the horses only through the window.
866 Q. You saw them through the window as they led them down?
A. They were taking them down, if I remember right, I was in

Form 120.

This Duplicate must be sent to office of Auditor of Freight Accounts with Forwarded Abstract on date billing for the car is reported.

DUPLICATE.

Burlington Route

Chicago, Burlington & Quincy Railway Company.

LIVE STOCK CONTRACT.

Agents of this Company are not authorized to agree to forward Live Stock to be delivered at any specified time or for any particular market.

Agents will permit only the names of the owners or bona fide employes, who accompany the stock, to be entered on the back of the Contract without regard to the number of attendants permitted by the rules of the Railroad for the number of cars shipped.

The Contract when endorsed by the person or persons in charge, and signed in ink by Agent, will entitle such person or persons to ride on same train with stock to care for same, but will not entitle holder of Contract to ride on any other train, nor will Contract be accepted for passage on any passenger train.

Conductor of freight train must punch Contract, or in absence of punch will endorse his name on back of Contract when presented for passage.

Live Stock Contracts are not good for return passage. Parties entitled to return passage will be provided with return tickets on application to proper office. **Conductors will be held strictly responsible for permitting persons to ride on Stock Contracts, except when in charge of Live Stock.**

NO. OF WAYBILL	NO. AND INITIAL OF CAR	No. of Animals in each car.	NO. OF WAYBILL	NO. AND INITIAL OF CAR	No. of Animals in each car.	NO. OF WAYBILL	NO. AND INITIAL OF CAR	No. of Animals in each car.
38	SPLA&SL							
	11653	2					Defts Ex 2.	

READ THE CONTRACT.

Cambria, Ia. Station.

THIS CONTRACT, made and entered into this 18th day of Sept. 190 6, by and between L. Miller of Cambria (Shipper's Residence.), of the first part, and the CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY of the second part,

WITNESSETH, That for and in consideration of tariff (Here insert Rate.) per cwt., subject to minimum weights as shown in published tariffs, the said Railway Company agrees to transport one cars loaded with Horses (number of cars, number of waybills, and number of animals as noted above), from Cambria to Broken Bow consigned to L. Miller; and the said first party, in consideration thereof, agrees to deliver the said animals, to the said Railway Company, for transportation between the points aforesaid upon the following terms, viz.:

That, Whereas, the said first party, before delivering the said animals to said Railway Company, demanded to be advised of the rate to be charged for the carriage of said animals, as aforesaid, and thereupon was offered by the said Railway Company alternative rates proportioned to the value of the said animals, such value to be fixed and declared by the first party or his agent, and

Whereas, Such alternative rates are made in pursuance of the provisions relating thereto of the classification of freights adopted as regulations by the said Railway Company, and fully set forth as follows, to-wit:

"Live Stock.—Ratings given above are based upon declared valuations by shippers, not exceeding the following:

Each Horse or Pony (Gelding, Mare or Stallion), Mule or Jack	$100.00	Each Calf	$10.00
Each Ox, Bull or Steer	50.00	Each Hog	10.00
Each Cow	30.00	Each Sheep or Goat	3.00

"When the declared value exceeds the above, an addition of 25 per cent. will be made to the rate for each 100 per cent. or fraction thereof, of additional "declared valuation per head"; which said alternative rates are fully shown in and upon the regular tariffs and classifications printed, published and posted by the said Company as required by law, and

Whereas, The first party, in order to avail himself of said alternative rates, and to secure the benefits thereof, has declared and does hereby declare said animals to be of the value as follows, to-wit:

Each horse Value, $ 100.00 Each Value, $

To which value the rate aforesaid is proportioned by the classifications and tariffs aforesaid:

Now, IN CONSIDERATION of the premises and of the foregoing, it is expressly agreed that for all purposes connected with, resulting from, or in any manner growing out of this contract, and the transportation of the said animals pursuant thereto, the value of the said animals and of each thereof, shall in no case exceed the said valuation.

It is further agreed in consideration of the alternative rate so made by the said Railway Company and accepted by the first party, that in case of loss of or damage to said animals, whether resulting from accident or negligence of said Railway Company, or its servants, the said Railway Company shall not be liable in excess of the actual loss or damage, and in no case shall the said Railway Company be liable in any manner in excess of the agreed valuation upon each animal lost or damaged. Nor shall said Railway Company be liable for loss or damage after delivery to any connecting line, nor for any loss or damage not incurred upon its own line; but nevertheless in the event that the said animals are to be transported beyond the line of the railway of the second party upon and by any connecting line forming a part of the system known as the "Burlington System" then it is expressly understood and agreed that this contract shall be for and shall inure to the benefit of, the corporation operating such connecting line, and such connecting line shall be liable to perform all the obligations of this contract.

It is further agreed that the said Railway Company shall in no case be liable for any loss or damage to said animals, unless a claim shall be made in writing by the owner or owners thereof, or his or their agents, and delivered to a General Freight agent of the said Railway Company, or to the agent of said Railway Company at the station from which the animals are shipped, or to the agent at the point of destination, within ten (10) days from the time the said animals are removed from the cars. And in case of loss or damage upon any connecting line, such connecting line shall not be in any manner liable unless claim shall be made in like manner in writing to such general officer or agent of such connecting line.

And in consideration of free transportation for ..... persons, designated by the first party, who have endorsed their names hereon in the presence of the agent, hereby given by said Railway Company such persons to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said Railway Company shall not be responsible for such attention and care; and, further, that the second party shall not be liable to the first party, or any of his servants, agents, or co-partners, or other person, carried pursuant to this contract, for any injury or damage, from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard.

It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge; that the second party shall not be liable for loss from theft, heat or cold, jumping from car, or other escape, injury in loading or unloading, injury which animals may cause to themselves or to each other, or which results from the nature or propensities of such animals, and that the Railway Company does not agree to deliver the stock at destination at any specified time, nor for any particular market.

WITNESS the name of the Railway Company by its Agent, and the hand of the first party, the day and year first above written.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Luther Miller Shipper.

166 = 220

By John J. Power Agent.

This Duplicate must be signed by Shipper and Agent.

the office looking out of the window, I think they were coming up then.

867 *A.* You saw them, you knew those were the horses to be shipped?

A. I supposed they were.

868 *A.* You knew they were stallions?

A. I didn't take notice of the horses at all.

869 Q. Do you recollect of some one ordering a car for stallions?

A. No, sir, I don't.

870 Q. Do you recollect Nelson refused to put them in the first car because it was so low and wasn't fit to ship stallions in?

A. I didn't hear the word stallion mentioned.

871 Q. You knew when Nelson signed the contract that these were the horses you had just seen?

A. I supposed they were.

872 Q. You are familiar with horses enough to know a stallion from a gelding or mare?

A. As a rule I do.

873 Q. When you looked out of the window and saw these horses you knew they were stallions?

A. I won't say whether I did or not.

Witness excused.

Defendant rests.

* * * * * * *

158–165 PLAINTIFF'S EX. "C."

Section 2074, Code of Iowa.

"No contract, receipt, rule or regulation shall exempt any Railway Corporation engaged in the *transcript* of persons or property from the liability of a Common Carrier or Carrier of Passengers which would exist had no contract, receipt rule or regulation been made or entered into".

(Here follows live stock contract, marked page 166.)

* * * * * * *

167–211 DEFENDANT'S EXHIBIT 9.

C., B. & Q. I. C. C. No. 5098.

Cancels I. C. C. No. 3631.

C., B. & Q. G. F. O. No. 3417.

Cancels C., B. & Q. G. F. O. No. 10353 of 1902, H. & St. J. G. F. O. No. 8277 of 1902, B. & M. R. G. F. O. No. 5160 of 1902.

Quincy Route No. 918-A.

Cancels Quincy Route No. 918.

Chicago, Burlington & Quincy Railroad, St. Louis, Keokuk & Northwestern Railroad, Hannibal & St. Joseph Railroad, Chicago, Burlington & Kansas City Railroad, Keokuk & Western Railroad, Kansas City, St. Joseph & Council Bluffs Railroad, Burlington & Missouri River Railroad in Nebraska, Chicago, Burlington & Quincy Railway Co., Lessee; Quincy, Omaha & Kansas City Railroad, and Iowa & St. Louis Railway; Chicago, Burlington & Quincy Railroad Co., Lessee.

Joint Freight Tariff Between Points in Iowa and Missouri on the C., B. & Q. and K. & W. R.'s West of Burlington, Fort Madison, and Keokuk, Iowa, or Alexandria, Mo.; Also Points on St. L., K. & N. W., H. & St. J., C., B. & K. C. R. R.'s, I. & St. L. Ry. and Q., O. & K. C. R. R., and all Stations on the B. & M. R. R. R. in Neb., Except as Noted Below.

212 Taking Effect January 30, 1904.

Governed by the Western Classification.

Missouri, west of Burlington, Ft. Madison, and Keokuk, Iowa, or Between all stations on C., B. & Q. and K. & W. R. R.'s in Iowa and Alexandria, Mo., also all stations on St. L., K. & N. W., H. & St. J., C., B. & K. C., Q., O. & K. C. R. R.'s, and I. & St. L. Ry.

And all stations on the B. & M. R. R. R. in Neb., except Omaha, So. Omaha and Nebraska City.

Rates.

Through rates on all freight will be based on proportional, or, in absence of proportional rates, on the local rates east of the Missouri River plus local rates west thereof, subject to rates applying to or from Burlington, Iowa, as maxima at C., B. & Q. R. R. stations; to Keokuk, Iowa, rates as maxima at K. & W. R. R. stations; Quincy, Ill.,

rates as maxima at Q., O. & K. C. R. R. and I. & St. L. Ry. stations; and St. Louis rates as maxima at St. L., K. & N. W., H. & St. J., C., B. & K. C. stations. Rates will in all cases be figured via the Missouri River crossing through which lowest combination can be made, the through rates so obtained in no case to exceed Mississippi River Point rates named above as maxima.

Special Notice.

See C., B. & Q. G. F. O. No. 8046-63 (C., B. & Q. I. C. C. No. 4096) of 1903, or *subsequent* issued for proportional class rates between stations on the C., B. & Q. and K. & W. R. R.'s in Iowa and Missouri and Pacific Junction or Nebraska City applying on traffic destined to or coming from points beyond.

Agents not supplied with requisite B. & M. R. R. R. local tariffs will ask Division Freight or General Freight Agents (by letter or wire) for such rates, when occasion requires use of same.

* * * * * * *

213 DEFENDANT'S EXHIBIT 10.

The Western Classification No. 40.

Rules and Conditions.

Taking Effect April 1, 1906.

Adopted by Chicago, Burlington & Quincy Railway Lines in Illinois, Iowa, Wisconsin and Minnesota; Chicago, Burlington & Quincy Railway Lines West of Missouri River.

Note important changes. (Originally Adopted April 16, 1883.)
Issued by the Western Classification Committee, Great Northern Building, F. O. Becker, Chairman.
Chicago, March 20, 1906.
Supersedes the Western Classification No. 39, dated September 20, 1905.

214 Page 69.

1. Live stock:
2. Ratings below are based upon values declared by shippers, not exceeding the following, under contract:

Each Horse or Pony (gelding, mare or stallion), Mule or Jack	$100.00
Each Colt, (under one year)	50.00
Each Ox, Bull or Steer	50.00
Each Cow	30.00
Each Calf	10.00
Each Hog	10.00
Each Sheep or Goat	3.00

Where the declared value exceeds the above an addition of 25 per cent will be made to the rate per 100 lbs. or car for each 100 per cent. or fraction thereof of additional declared value per head; animals exceeding in value $800.00 per head, or when no value is given, will be taken only by special arrangement.

3. Live Stock, in carloads (limited liability for each animal under contract at values stated above.) See Tariff.

4. Live Stock, L. C. L. (limited liability under contract, at values stated above), at the following estimated weights (Exception to Rule 1), viz:

5. One Horse (gelding or mare) or Pony, Mule or Domestic Horned Animal (except bulls), N. O. S., 2,000 lbs.; two animals, 3,500 lbs.; three (C. L.) 5,000 lbs.; each additional animal, 1,000 lbs.	1
6. Bulls, 2,000 lbs. each	1
7. Burros, 750 lbs. each	1
8. Calves (under one year), in crates, 500 lbs. each	1
9. Calves not in crates, will be rated the same as adult animals.	
10. Colts (under one year), 750 lbs. each	1
11. Goats, in crates, estimated wt. 200 lbs. each	1
12. Hogs, in crates, actual wt.	1
13. Sheep, in crates, 200 lbs. each	1
14. Stallions or Jacks, 3,000 lbs. each	1

(Here follows way bill marked page 215.)

F-12-0j 50M

Burlington Route

THIS WAYBILL FOR
LIVE STOCK
ONLY.

Chicago, Burling

FROM Cambria, Ia TO Broke

ROUTE

VIA JUNCTION	WITH ..... R'Y.	VIA JUNCTION	WITH .....
VIA JUNCTION	WITH ..... R'Y.	VIA JUNCTION	WITH .....

WEIGH THIS CAR AT .....

STOP THIS CAR AT .....

★WHEN A THROUGH RATE IS USED AND THE SHIPMENT IS TO BE RE-WAYBILLED EN ROUTE, THE

CONSIGNOR, CONNECTING LINE REFERENCE, ORIGINAL CAR AND WAYBILL NUMBER AND POINT OF SHIPMENT.	MARKS, CONSIGNEE AND
L. Miller	L. Mills Defte &

AGENTS AT JUNCTION STATIONS RECEIVING THIS WAY BILL FROM CONNE

1	2	3
STAMP OF JUNCTION FORWARDING AGT.	STAMP OF JUNCTION FORWARDING AGT.	STAMP OF JUNCTI

Form 39

...go, Burlington & Quincy Railway Company. } EAST

LINES EAST OF THE MISSOURI RIVER.

WAYBILL

SERIES ..... No. 3

1 TO Broken Bow, Neb. DATE Sept 18-06 CAR INT. S.P.L.&S.L. CAR No. 116 5-3

VIA JUNCTION ... WITH ... RY. | VIA JUNCTION ... WITH ... RY.

VIA JUNCTION ... WITH ... RY. | VIA JUNCTION ... WITH ... RY.

GROSS, TARE AND NET WEIGHT OF CAR LOAD FREIGHT TO BE ENTERED IN THIS SPACE, WHERE THE Lincoln Land Co. CLAIM OE OCT 26 1906 R2546 R. Island

See 611

TONS—GROSS ... FREIGHT ...

SHOW TRANSFERS BELOW

1 Sept. Claims RF | 3 S.L. RF

2 489 & 12 | 4 282 & 11384

..... MARKED CAPACITY OF CAR ..... LBS.

..... FOR .....

WAYBILLED EN ROUTE, THE SUBDIVISIONS MUST BE SHOWN IN THE RATE COLUMN IN ROAD ORDER, NOTING OPPOSITE EACH SUBDIVISION THE INITIAL OF THE ROAD TO WHICH IT ACCRUES.

MARKS, CONSIGNEE AND DESTINATION	NO. OF HEAD	DESCRIPTION OF STOCK	WEIGHT	RATE AND AUTHORITY*	FREIGHT	ADVANCES	PREPAID
Miller	2	~~Horses~~ Stallion	6000	1038	62 28		
Defts Ex 11.	21		~~35000~~	+31	~~45 81~~		
	1	Bd. QR. applied	300	94½	2 69		
	1	Rel. to Conf. Value	100 lbs		1 04		
	10	Broken Bow Loaded at			96 01 Sept. 18-06		

Defts Ex 11

215

WAY BILL FROM CONNECTING LINE MUST STAMP IN THE SPACES BELOW, IN CONSECUTIVE ORDER, THE NAMES OF THEIR STATIONS AND DATE UPON WHICH THE WAY BILL IS RECEIVED

3 | 4

AGT. STAMP OF JUNCTION FORWARDING AGT. | STAMP OF JUNCTION FORWARDING AGT

DATE ... TRAIN NO. ... TIME ...
TO BE FILLED IN BY FIRST CONDUCTOR TAKING THE CAR.

DATE ... TRAIN NO. 1 ... TIME ...
TO BE FILLED IN BY CONDUCTOR LEAVING CAR AT DESTINATION.

AGENT AT DESTINATION WILL STAMP HEREIN THE DATE RECEIVED.

216 H. FRED MILLER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

I hereby certify that the foregoing is a true and correct transcript of all the testimony, both oral and documentary, introduced and offered on the trial of the above entitled cause, together with all the objections interposed, with the grounds therefor, the rulings thereon, and the exceptions taken thereto, during said trial.

Dated at Kearney, Nebraska, this 1st day of April, 1908.

T. HERMANSEN,
Official Court Reporter.

Received this proposed Bill of Exceptions for examination and amendment this 25 day of April, 1908, and we return the same on this 13" day of May, 1908, with no recommendations or objections.

SULLIVAN & SQUIRES,
Counsel for Plaintiff

I hereby certify that the foregoing and proposed Bill of Exceptions contains all the evidence, both oral and documentary, introduced and offered on the trial of the above entitled cause, and I hereby approve, sign, settle and allow the same as the Bill of Exceptions in said cause and order that the same be made a part of the record therein.

Dated, Kearney, Nebr. this 13 day of May, 1908.

BRUNO O. HOSTETLER,
Judge of the District Court, Twelfth Judicial District, State of Nebraska.

STATE OF NEBRASKA,
Custer County, ss:

217 I, Geo. B. Mair, Clerk of the District Court of Custer County, Nebraska, hereby certify that the above and foregoing is the original Defendant's Bill of Exceptions, filed in said cause in this Court.

Witness my hand and official seal, this 13" day of May, A. D. 1908.

[SEAL.] GEO. B. MAIR,
Clerk of the District Court, Custer County, Nebraska.

* * * * * * *

218 And on the same day, to-wit, the 30th day of July, 1908, there was filed in the office of the Clerk of said Supreme Court a certain praecipe and assignments of error in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

H. FRED MILLER, Appellee,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Appellant.

Praecipe and Brief of Errors on Appeal.

The appellant, Chicago, Burlington and Quincy Railway Company, complains of the appellee, H. Fred Miller, that on the 14th day of February 1908 said appellee obtained a judgment against the appellant in the sum of $1315.50 with interest thereon from said date at 7 per cent per annum until paid, and the further sum of $112.15 costs, in an action then pending in the District Court of Custer County, Nebraska, in which the appellee, H. Fred Miller was plaintiff, and the appellant, Chicago, Burlington and Quincy Railway Company was defendant. A transcript of said judgment and record in said action, together with the bill of exceptions on the trial, are filed herewith.

The appellant requests the Clerk of the Supreme Court of the State of Nebraska to issue notice of appeal to the parties in the action as above designated.

The appellant alleges that there is error in said judgment and proceedings as follows:

1. The court erred in overruling the motion for a new trial of the defendant.

2. The verdict and judgment are contrary to law and are not supported by sufficient evidence to sustain them.

3. The verdict and judgment are contrary to law.

4. The verdict and judgment are not supported by sufficient evidence to sustain them.

219 5. The amount of recovery allowed the appellee as damages is excessive and is not supported by sufficient evidence to sustain it.

6. The amount of the verdict and judgment is excessive and manifestly above the value of the stallion as shown by the testimony and is the result of passion and prejudice on the part of the jury.

7. The court erred in overruling the defendant's exceptions to the deposition of I. M. Wood and Carl Moore (page 17) and in overruling the objections of the defendant to the introduction in evidence of the said depositions (page 96)—said depositions being shown in the record at pages 156 and 157

8. The court erred in holding that the rights and obligations of the parties to said action were not governed and determined by the Acts of Congress regulating interstate commerce and the tariffs, rules, regulations and classifications of the defendant which had been published and filed with the Interstate Commerce Commission by the defendant pursuant to said Acts of Congress.

9. The court erred in holding that the rights and obligations of the parties to said action were governed and determined by the laws of the State of Nebraska.

10. The court erred in holding that the plaintiff was entitled to recover in said action and in refusing to instruct the jury to find a verdict for the defendant.

11. The court erred in refusing to instruct the jury that the plaintiff was not entitled to recover a verdict in excess of $100.00 and interest thereon at 7 per cent per annum from the 18th day of September 1906 to the 3rd day of February 1908.

12. The court erred in overruling the 11th ground of the motion for a new trial for the reason therein stated.

13. The court erred in giving its instruction No. 1.

14. The court erred in giving its instruction No. 2.

220 15. The court erred in giving its instruction No. 3.

16. The court erred in giving its instruction No. 4.

17. The court erred in giving its instruction No. 5.

18. The court erred in giving its instruction No. 6.

19. The court erred in giving its instruction No. 7.

20. The court erred in giving its instruction No. 8.

21. The court erred in giving its instruction No. 9.

22. The court erred in giving its instruction No. 10.

23. The court erred in giving its instruction No. 11.

24. The court erred in giving its instruction No. 12.

25. The court erred in giving its instruction No. 13.

26. The court erred in giving its instruction No. 14.

27. The court erred in refusing to give the instruction requested by defendant numbered 1.

28. The court erred in refusing to give the instruction requested by the defendant numbered 2.

29. The court erred in refusing to give the instruction requested by the defendant numbered 3.

30. The court erred in refusing to give the instruction requested by the defendant numbered 4.

31. The court erred in refusing to give the instruction requested by the defendant numbered 5.

32. The court erred in refusing to give the instruction requested by the defendant numbered 6.

33. The court erred in refusing to give the instruction requested by the defendant numbered 7.

34. The court erred in refusing to give the instruction requested by the defendant numbered 8.

35. The court erred in refusing to give the instruction requested by the defendant numbered 9.

Wherefore, appellant prays that said judgment be re-
221–224 versed and for such other relief as the law may require.

JAMES E. KELBY,
ARTHUR R. WELLS,
Attorneys for Appellant.

Endorsed: 15794. Miller v. C., B. & Q. Ry. Co. Praecipe & Assignments of error. Supreme Court of Nebraska. Filed Jul. 30, 1908. H. C. Lindsay, Clerk.

* * * * * * *

225 And on the following day, to-wit, the 7th day of January, 1909, there was filed in the office of the Clerk of said Supreme Court a certain stipulation to supply, in the words and figures following, to-wit:

226 In the Supreme Court of the State of Nebraska.

Genl. No. 15794.

H. FRED MILLER, Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY CO., Appellant.

Stipulation.

It is hereby stipulated and agreed by the parties to this cause that the following was omitted from the bill of exceptions in this cause by over-sight and is now supplied and added thereto by agreement of parties to wit:

"Plaintiff in rebuttal offers in evidence section 2074 of the Code of Iowa, reading as follows: 'No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into.'

"It is agreed by the parties that said statute was a part of the law of the state of Iowa and was in effect at the time the horse involved in the action was shipped by the plaintiff, and at the time said horse died; but the defendant objects to the introduction of said statute in evidence on the ground that the same is irrelevant and immaterial to the issues in this case. Which objection is overruled by the court, to which ruling defendant excepts."

It is hereby agreed by the parties that the foregoing shall be added to and made a part of the bill of exceptions now on file in the Supreme Court of Nebraska in this cause; and may be considered in all respects as if the same had appeared in the said bill of exceptions as a part of the evidence produced in said cause by the plaintiff at the time said bill of exceptions was duly settled. And the defendant shall make no objection because the same has been

227 & 228 incorporated in and made a part of said bill of exceptions at this time.

SULLIVAN & SQUIRES,
Attorney- for Appelle.
JAMES E. KELBY,
ARTHUR R. WELLS,
Attorney- for Appellant.

Endorsed: 15794. In the Supreme Court of the State of Nebraska. H. Fred Miller, Appellee, vs. C., B. & Q. Railway Company, Appellant. Stipulation. Supreme Court of Nebraska. Filed Jan. 7, 1909. H. C. Lindsay, Clerk.

* * * * * * *

29 And afterwards, to-wit, on the 19th day of October, 1909, the following among other proceedings were had and done in aid Supreme Court, to wit:

Supreme Court of Nebraska, September Term, A. D. 1909.

Oct. 19.

The following causes were argued by counsel and submitted to the ourt:

* * * * * * *

No. 15794.

Miller
v.
Chicago, B. & Q. R. Co.

Appeal, Custer Co.

* * * * * * *

And afterwards, to-wit, on the 19th day of November, 1909, there as rendered by said Court and entered of record upon the Journal ereof a certain Judgment in the words and figures following, to-t:

Supreme Court of Nebraska, September Term, A. D. 1909.

No. 15794.

H. Fred Miller, Appellee,
v.
Chicago, B. & Q. R. Co., Appellant.

Appeal from the District Court of Custer County.

Nov. 19.

This cause coming on to be heard upon appeal from the district urt of Custer county, was argued by counsel and submitted to e court; upon due consideration whereof, the court doth find no or apparent in the record of the proceedings and judgment of said trict court; it is therefore, considered, ordered and adjudged that al judgment of the district court be, and the same hereby is, rmed; that appellee pay all costs incurred herein by him, taxed at —, and have and recover from appellant all his costs so expended; at appellant pay all costs incurred herein by it, taxed at $—, for all which execution is hereby awarded, and that a mandate issue ac-dingly.

0 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Opinion by said Court,

pursuant to which the preceding Judgment was entered, which Opinion is in the words and figures following, to-wit:

231

No. 15794.

MILLER
v.
CHICAGO, B. & Q. R. Co.

Opinion. Filed November 19, 1909.

1. "A common carrier of live stock, cannot, by contract with a shipper, relieve itself, either in whole or in part, from liability for injury or loss resulting from its own negligence."
Chicago, R. I. & P. R. Co. v. Witty, 32 Neb. 275.

2. The Acts of Congress examined and referred to in the opinion held, not to in any manner supersede or amend the rule at common law with reference to the liability of a common carrier for its negligence in the transportation of property by interstate shipments.

232 FAWCETT, *J.*:

On September 18, 1906, plaintiff shipped two stallions from Cambria, Iowa, over defendant's railroad to Broken Bow, Nebraska. While the animals were in transit the bedding in the car in which they were loaded, caught fire and one of the stallions died as a result of inhaling the flames and smoke from the fire. This action was brought to recover $2,000, the alleged value of the stallion. Defendant by its amended answer alleged that the shipment was interstate; that the rate of charge for the transportation of the animal depended upon and was proportioned to the value of said horse, which value was fixed and declared by plaintiff; that plaintiff was advised of the rate to be charged, and that a greater rate would be charged for a greater value; that plaintiff placed the value of $100 on said horse, upon which valuation the freight rate was assessed, and that by reason thereof plaintiff obtained the benefit of the lower rate determined by the value fixed by him rather than the higher rate placed on a higher valuation according to the tariffs and classifications of defendant published and in force according to law at the time, whereby plaintiff is bound by said valuation, and in no event can he recover more than $100 for the loss of the horse.

For reply to this amended answer plaintiff set up the statute of the state of Iowa which provided that no contract, rule or regulation should exempt any railroad corporation from its liability as a common carrier, and denied that he agreed to the valuation fixed upon the horse or authorized any other person or agent to agree for him as to what the valuation of said horse was at the time
233 of the shipment, and never agreed that the defendant was to be relieved from any liability which it might incur with reference to, or in connection with said shipment. There was a

trial to a jury which resulted in a verdict for plaintiff for $1,315.50. Judgment was rendered upon the verdict and defendant appeals.

Defendant in its brief states the real questions in controversy thus: "The defendant requested the trial court to give a series of instructions numbered 2, 3 and 4 to the effect that the plaintiff was bound by the provisions of the tariffs under which the rate of charge for transporting the animals had been fixed and could recover not to exceed $100 and interest from the date of shipment. The court refused the instructions asked by defendant and gave to the jury instructions 9, 10 and 11, wherein he told the jury that the defendant was subject to all the liabilities of a common carrier of said horse; that a contract between the shipper and the carrier which limits the liability of the carrier or relieves it entirely or partially from damages for the loss of such stock is void and of no effect, and that the defendant must answer for the full value of the animal. * * * The rulings on these instructions severally were assigned as grounds of the motion for a new trial, which was overruled, and errors assigned thereon. It is to secure a review of these errors that this appeal is prosecuted. * * *Stated in its simplest terms the question is whether the liability of the defendant for the loss of the horse is governed by the laws of Nebraska or by the laws of the United States with reference to which and in compliance with which the tariffs of the carrier had been published and filed."

234 The contract relied upon by defendant contains a provision to the effect that the shipper had been offered by the railroad company alternative rates proportioned to the value of said animal, said value being fixed and declared by the shipper or his agent, and that the shipper in order to avail himself of said alternative rates and to secure the benefits thereof, declared the value of each of the said animals to be $100. The rate charged for the transportation of the animal was the rate fixed by the tariffs based upon the value declared in the contract of $100 per head. The record fairly sustains plaintiff's résumé of the evidence as contained in his brief, viz., that while the horses were en route, near the town of Hastings in the state of Iowa, while the train was pulling up a steep grade, a fire originated in the car in which the horse was placed, caused probably by the sparks from the engine. As a result of the fire the horse in controversy was burned and injured so that he died in the car somewhere between Lincoln and Broken Bow, in the state of Nebraska. The occupants of an adjoining freight car discovered the fire and notified the engineer and train crew of that fact. The engineer and train crew made no immediate effort to extinguish the fire but continued to run the train, while the car was burning, until they reached the top of the grade. Those who discovered the fire carried water from some barrels in a box car, and later from the engine tender, while the train was still running, and tried to extinguish the fire but were unable to do so. With full knowledge of the burning car the engineer refused to stop his train until as above indicated; that plaintiff did not personally load and

235 bill the horse nor was he present when the same was done; that his brother, Luther Miller, had this done; that Luther

Miller did not personally superintend the loading or procure the bill of lading, but had one L. O. Nelson, an employee, do so. Nelson was not expressly authorized to waive any of plaintiff's rights, to fix any rates for shipment of the horse, or to agree to any value of the horse less than its true value. There was no conversation between Nelson and the company's agent as to the rate charged for shipment, the value of the horse, or of the conditions of the contact of shipment. After loading the horse upon the car, Nelson hurriedly went into the depot and procured the bill of lading; that the agent of the company had inserted in the contract of shipment as the value of the horse the sum of $100, and by the terms of the contract to which Nelson signed the name of Luther Miller, and not the name of the plaintiff, the company's liability in connection with the shipment and the loss or injury to the horse was limited to the sum of $100. No freight was paid for the horses at the initial point of shipment, but freight was paid at the point of destination for the live horse, which was shipped with the horse involved in this case. The contract upon which defendant relies is substantially set out in defendant's amended answer.

The law in force in the state of Iowa at the time the shipment was made (Sec. 2074 code) was as follows: "No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into."

Section 4, art. 11 of the constitution of the state of Nebraska, is as follows: "The liability of railroad corporations as common
236 carriers shall never be limited." If the law governing this shipment is to be found in the sections of the Iowa statute and Nebraska constitution above quoted, defendant's appeal is clearly without merit. But defendant insists that it is not bound by these sections for the reason that the powers of Congress over interstate commerce are plenary, and that legislation by congress supersedes any state laws which may have been theretofore in force; that the acts of congress regulating interstate commerce constitute a comprehensive body of law for the regulation of that commerce and of the rights and duties of those who engage therein; that the rights of the shipper and the duties of the carrier as to rates charged and service furnished and liabilities incurred in interstate commerce are fixed and determined by the tariffs which are published and filed by the carrier with the interstate commerce commission in pursuance to acts of congress; that to compel the defendant to pay the judgment rendered in this case would be to force it to violate the federal statutes regulating interstate commerce; that the reasonableness of the rate charged of the regulation of the tariffs as to the liability assumed by the carrier cannot be inquired into in this proceeding. In support of its contention the defendant calls attention to the act of congress to regulate commerce, approved Feb. 24, 1887; the amendatory acts approved March 2, 1889, Feb. 10, 1891,
237 and Feb. 8, 1895; the Elkins Act approved Feb. 19, 1903, and the Hepburn act, approved June 29, 1906, amending

both the original interstate act and the Elkins act. Defendant quotes from the amended section 6 of the interstate commerce act as follows: "That every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation, * * * the schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * * No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor
238 shall any carrier refund or remit in any manner or by by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Defendant also quotes from the Elkins Act as amended by the Hepburn Act, as follows: "The wilful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor; * * * and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in inter-state or foreign commerce by any common carrier subject to said Act to Regulate Commerce and the Acts Amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that amended in the tariffs published and filed by such carrier, as is required by said Act to Regulate Commerce and the Acts Amendatory thereof, or whereby any other advantage is given or discrimination is practiced. * * * Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to Regulate Commerce or Acts Amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall

demanded a return of the excess. Moreover, if the value fixed in the contract is binding upon a shipper it is equally so upon the carrier, and under the doctrine of estoppel contended for the shipper could fix the value of a very inferior animal at a ridiculously high amount and in case of loss collect from the carrier such fictitious
243 value. The old adage, "It is a poor rule that does not work both ways," would seem to be apropos.

The negligence of defendant and amount of plaintiff's damage having been fully established, the judgment of the district court is Affirmed.

244 And afterwards, to-wit, on the 30th day of December, 1909, there was filed in the office of the Clerk of said Supreme Court a certain petition for Writ of Error, which original petition with the filing marks and endorsements thereon marked "Exhibit A" is hereto attached.

245 EXHIBIT A.

H. C. Lindsay, Clk Supreme Court, Nebraska.

In the Supreme Court of the State of Nebraska.

H. FRED MILLER, Plaintiff and Appellee,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Defendant and Appellant.

Petition for Writ of Error.

To the Honorable Manoah B. Reese, Chief Justice of the Supreme Court of Nebraska:

Your petitioner, the Chicago, Burlington and Quincy Railway Company, a corporation, respectfully represents that on the 19th day of November, A. D. 1909, in the said Supreme Court of the State of Nebraska a judgment was rendered against the petitioner in a suit wherein said H. Fred Miller was the plaintiff and appellee, and said Chicago, Burlington and Quincy Railway Company was the defendant and appellant, which said judgment is final, and the court rendering the same is the highest court in said State in which a decision of said cause could be had.

Your petitioner further shows that in said action certain rights, privileges and immunities under the Constitution and Statutes of the United States were specially set up and claimed by the petitioner and the decision of said court in said action was against the said rights, privileges and immunities specially set up and claimed by the said petitioner.

Your petitioner further shows that there was also drawn in question in said action the validity of a statute of the State of Iowa and of a statute and the Constitution of the State of Nebraska on the ground

of their being repugnant to the Constitution and laws of the United States, and the decision of said court was in favor of their validity.

Wherefore, petitioner prays the allowance of a writ of error removing the records and proceedings in said suit to the Supreme Court of the United States, and that a citation be directed to
246 & 247 said H. Fred Miller, defendant in error, for his due appearance in said Supreme Court.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, *Plaintiff in Error.*
By ARTHUR R. WELLS,
HALLECK F. ROSE, *Its Attorneys.*

Writ of error and citation in the within named and above entitled case allowed this 31 day of December, 1909.

M. B. REESE,
Chief Justice of the Supreme Court of the State of Nebraska.

* * * * * * *

248 And on the same day, to-wit, the 30th day of December, 1909 there was also filed in the office of the Clerk of said Supreme Court, a certain assignments of error and prayer for reversal, which said original assignments of error with the filing marks thereon, is hereto attached and marked "Exhibit B"

249 EXHIBIT B.

H. C. Lindsay, Clerk Supreme Court, Nebraska.

In the Supreme Court of the State of Nebraska.

H. FRED MILLER, Plaintiff and Appellee,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Defendant and Appellant.

Assignments of Error.

Comes now the Chicago, Burlington and Quincy Railway Company, defendant and appellant, and says that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Nebraska in the above entitled cause, there are the following errors upon which the said Chicago, Burlington and Quincy Railway Company will rely in the prosecution of the writ of error in the above entitled case, the parties being hereinafter designated as plaintiff and defendant, respectively, as in the court below.

I.

The court erred in affirming the judgment of the District Court of Custer County, Nebraska, in favor of the plaintiff and against

2.

The court erred in deciding that the rights of the plaintiff (the shipper) against the defendant (a common carrier), and the obligations and liabilities of the defendant to the plaintiff arising from and growing out of the transportation of the horse of the plaintiff from a point in the State of Iowa to a point in the State of Nebraska by the defendant, as a common carrier by railroad, were determined and governed by Sec. 4 of Article XI of the Constitution of the State of Nebraska, and by section 2074 of the Code of 1897 of the State of Iowa; said section 4 of Article XI of the Constitution of the State of Nebraska, and section 2074 of the Code of Iowa, as applied to interstate commerce, are repugnant to section 8 of Article I of the Constitution of the United States granting the Congress power "to regulate commerce with foreign nations, and among the several states", and the Acts of Congress enacted pursuant thereto.

250

3.

The court erred in deciding that the rights of the plaintiff (the shipper) and the obligations and liabilities of the defendant (a common carrier) arising from and growing out of the transportation of the plaintiff's horse by and over the railroad of the defendant from a point in the State of Iowa to a point in the State of Nebraska and all the privileges or facilities granted or allowed said shipper by said carrier, and to which said shipper was entitled in the transportation of his said horse, and any rules and regulations which in any wise changed, affected or determined any part of the aggregate of the rate and charges for the said transportation of said horse or the value of the service rendered said shipper by said common carrier by railroad in the transportation of said horse, were not governed, fixed and determined by the Act of Congress entitled "An Act to regulate Commerce", approved February 4th, 1887, and the Acts amendatory thereof and supplemental thereto, and by the tariffs, rules and classifications of the defendant railroad company which had been published by defendant as a common carrier by railroad and filed with the Interstate Commerce Commission pursuant to the terms of said Acts, and which were in full force and effect when said shipment of plaintiff was transported and were applicable thereto.

4.

The court erred in passing upon and deciding against the lawfulness and reasonableness of the published tariffs of the defendant providing that the rate of charge for the transportation of the plaintiff's stallion should depend upon and be proportioned to the value of the animal shipped, which value was to be fixed and determined by the declaration of the shipper or his agent; jurisdiction to inquire into and decide upon the lawfulness and reasonableness of such tariff provisions is vested exclusively in the Interstate Commerce Commission, subject to review by the Federal Courts, and the State Courts have no jurisdiction or power to pass on said questions.

5.

The court erred in holding illegal and void those provisions of the tariffs, classifications and rules of the defendant which had been published by the defendant as a common carrier engaged in
251 interstate commerce and filed with the Interstate Commerce Commission, which provided that the rate of charge for the transportation of said horse should depend upon and be proportioned to the value of said horse, which value was to be fixed and determined by the shipper or his agent, and that a higher rate would be charged for a higher value.

6.

The court erred in holding that the defendant, as a common carrier engaged in interstate commerce, had not the right, under the Acts of Congress regulating interstate commerce, to adopt and put into effect rates for the transportation of property in interstate commerce based upon and proportioned to the valuation of the property transported as declared by the shipper or his agent.

7.

The court erred in deciding that the plaintiff is not bound by the valuation of his said property as declared by his agent, upon which declared valuation the rate of charge for the transportation of said property was assessed as provided by the tariffs, rules and classifications of the defendant which had been published and filed with the Interstate Commerce Commission as required by the Acts of Congress regulating interstate commerce.

8.

The court erred in refusing to hold that plaintiff is estopped from claiming that his said horse was worth more than $100.00 by his conduct in causing and allowing said horse to be transported by defendant and the charge to be assessed on the basis of said valuation and by paying the charges assessed on that basis for the transportation of the other horse shipped in the same car, under the same contract, and on the same billing as the horse for the loss of which this action is maintained.

9.

The court erred in that the court has adopted and by its judgment will enforce a rule and principle of law which imposes a burden upon and interferes with and regulates interstate commerce contrary to and in violation of the Acts of Congress regulating such commerce enacted pursuant to section 8, Article I of the Con-
252 stitution of the United States.

10.

The court erred in rendering the judgment, the effect of the enforcement of which is to destroy that uniformity and equality of rights and privileges between persons in all the states, who ship prop-

erty by railroad in interstate commerce, which Congress intended to and did secure and require by the enactment of the several Acts regulating interstate commerce.

11.

The court erred in rendering said judgment in that the effect of the enforcement of said judgment will be to compel defendant to violate the Acts of Congress regulating interstate commerce.

12.

The court erred in rendering the judgment which in effect compels the defendant to violate the Acts of Congress regulating interstate commerce by departing from the provisions of its lawfully published tariffs, classifications and rules, in that if defendant is required to pay the judgment rendered by the court it will have transported plaintiff's property at a less rate and will have furnished to plaintiff service of a greater value than that provided by the lawfully established tariffs, classifications, and rules of defendant governing and applicable to said shipment, contrary to and in violation of section 6 of the Act of Congress entitled "An Act to Regulate Commerce," approved February 4th, 1887, and section 1 of the Act of Congress entitled "An Act further to regulate commerce with foreign nations and among the states," approved February 19th, 1903, as both of said Acts are amended by section 2 of the Act of Congress approved June 29th, 1906 (34 Stats. at Large, 587); and the enforcement of said judgment will require defendant to furnish plaintiff the service rendered in the transportation of said property at a less compensation than the defendant charged, demanded, collected and received from other persons for a like and contemporaneous service in the transportation of a like kind of traffic under similar circumstances and conditions, contrary to and in violation of section 2 of the Act of Congress approved February 4th, 1887 entitled "An Act to Regulate Commerce." (24 Stats. at Large, 379).

253

13.

The court erred in that the effect of the judgment will be to give the plaintiff an undue, unreasonable and unlawful preference and advantage, contrary to and in violation of section 3 of the Act of Congress regulating interstate commerce approved February 4th, 1887.

14.

The court erred in holding that the rights of the parties to this action were governed and determined by the Constitution of Nebraska and the statutes of Iowa, in that the effect of the application of the constitutional and statutory enactments of said states to contracts of shipment in interstate commerce, and the rights and obligations of the parties arising therefrom, is to give to persons who ship property in interstate commerce from and to points in said states, or who bring

suit in the courts of said states on such contracts, an undue, unreasonable and unlawful preference and advantage to the undue, unreasonable and unlawful prejudice and disadvantage of interstate shippers in other states and of those who bring suit on such contracts in the courts of other states, contrary to and in violation of the Acts of Congress regulating interstate commerce.

15.

The court erred in that by its judgment it enforced a rule of law which will enable a shipper by knowingly and wilfully understating the value of his property, to perpetuate a fraud contrary to and in violation of section 10 of the Interstate Commerce Act by obtaining the transportation of his property at less than the regular rates then established and in force on the route over which the shipment moved.

16.

The court erred in holding that the provisions of the defendant's lawfully established tariffs, rules and classifications set up in the answer and relied upon by the defendant were void as involving an illegal limitation of a carrier's liability for its own negligence.

254 17.

The court erred in holding that the rule announced by the Supreme Court of the United States in the case of Hart vs. Railroad Company, 112 U. S. 331, has been superseded or abolished by paragraph 11 of section 20 of the Act of Congress approved February 4th, 1887, entitled "An Act to regulate commerce," as amended by the Acts of Congress approved June 29th, 1906.

Wherefore, the said Chicago, Burlington and Quincy Railway Company prays that the judgment of the said Supreme Court of the State of Nebraska be reversed and judgment be rendered herein in favor of the said Chicago, Burlington and Quincy Railway Company, and for costs.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY,
Plaintiff in Error.

By ARTHUR B. WELLS,
HALLECK F. ROSE,
Its Attorneys.

255 [Endorsed] #15794. In Supreme Court of Nebraska. H. Fred Miller, Appellee, vs. Chicago, Burlington and Quincy Railway Company, Appellant. Assignments of Error and Prayer for Reversal. Supreme Court of Nebraska. Filed Dec 30, 1909. H. C. Lindsay, clerk. Arthur B. Wells, Att'y for Plaintiff in Error.

256 And afterwards, to-wit, the 31st day of December, 1909, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain order allowing writ of error, in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1909, Dec. 31.

H. Fred Miller, Appellee,
v.
Chicago, B. & Q. R. Co., Appellant.

Appeal from the District Court of Custer County, No. 15794.

This cause coming on to be heard upon the assignments of error and petition for a writ of error to the Supreme Court of the United States by the Chicago, Burlington & Quincy Railway Company, appellant herein, upon due consideration whereof, it is ordered that a writ of error removing the record and proceedings in said suit to the Supreme Court of the United States be allowed and that a citation be directed to H. Fred Miller, appellee herein and defendant in error for his due appearance in said Supreme Court of the United States.

257 And afterwards, to-wit, on the 8th day of January, 1910 there was filed in the office of the Clerk of said Supreme Court, a certain writ of error, which said original writ, together with the allowance thereof, and all filings thereon, is hereto attached and marked "Exhibit C."

258 Exhibit C.

H. C. Lindsay, Clerk Supreme Court Nebraska.

Writ of Error.

United States of America, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Nebraska before you, or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had between Chicago, Burlington and Quincy Railway Company, a corporation, defendant and plaintiff in error, and H. Fred Miller, plaintiff and defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, Treaties or Laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a Treaty or Statute of, or commission held under the United States, and the decision was against the right, title, privilege and immunity

specially set up or claimed by said plaintiff in error under such clause of said Constitution, Treaty, Statute or Commission, and manifest error hath happened to the great damage of the above named plaintiff in error as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same in said Supreme Court of the United States at Washington within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of January, in the year of our Lord, One Thousand Nine Hundred and Ten.

[Seal United States Circuit Court District of Nebraska.]

GEO. H. THUMMEL,
Clerk of the Circuit Court of the United States for the District of Nebraska.

Allowed:

MANOAH B. REESE,
Chief Justice of the Supreme Court of Nebraska.

259 [Endorsed:] 15794. In the Supreme Court of Nebraska. H. Fred Miller, Appellee (Defendant in Error), vs. Chicago, Burlington and Quincy Railway Company, Appellant (Plaintiff in Error). Writ of Error. Supreme Court of Nebraska. Filed Jan. 8, 1910. H. C. Lindsay, Clerk.

260 And on the same day, to-wit, the 8th day of January, 1910, there was lodged and filed in the office of the Clerk of said Supreme Court a certain copy of Writ of Error for use of defendant in error, in the words and figures following, to-wit:

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Nebraska before you, or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had between Chicago, Burlington and Quincy Railway Company, a corporation, defendant and plaintiff in error, and H. Fred Miller,

plaintiff and defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, Treaties or Laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a Treaty or Statute of, or commission held
261 under the United States, and the decision was against the right, title, privilege and immunity specially set up or claimed by said plaintiff in error under such clause of said Constitution, Treaty, Statute or Commission, and manifest error hath happened to the great damage of the above named plaintiff in error as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same in said Supreme Court of the United States at Washington within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 4th day of January, in the year of our Lord, One Thousand Nine Hundred and Ten.

[Seal U. S. Circuit Court.]

(Signed) GEO. H. THUMMEL,
Clerk of the Circuit Court of the United States for the District of Nebraska.

Allowed:

(Signed) MAXOAH B. REESE,
Chief Justice of the Supreme Court of Nebraska

STATE OF NEBRASKA, ss:

I, H. C. Lindsay, Clerk of the Supreme Court of said state hereby certify that the foregoing is a true copy of the original writ of error in the above cause, together with all indorsements thereon. In witness whereof I have hereunto affixed the seal of said court and set my hand this January 8th, 1910.

[SEAL.] H. C. LINDSAY, *Clerk.*

262 [Endorsed]: 15791. In the Supreme Court of Nebraska. H. Fred Miller, Appellee (Defendant in Error) v. Chicago, Burlington & Quincy Railway Company, Appellant (Plaintiff in Error). Writ of Error. (Copy.) Supreme Court of Nebraska. Filed Jan. 8, 1910. H. C. Lindsay, Clerk.

And on the same day, to-wit, the 8th day of January, 1910, there was issued by the Hon. Manoah B. Reese, Chief Justice of the Supreme Court of the state of Nebraska, a Citation, which said original citation, together with the acknowledgement of the service thereof is hereto attached, marked "Exhibit D."

2951 EXHIBIT D.

H. C. Lindsay, Clerk Supreme Court Nebraska.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to H. Fred Miller, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of Nebraska, wherein Chicago, Burlington and Quincy Railway Company was plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why equity justice should not be done to the parties in that behalf.

Witness the Honorable Manoah B. Reese, Chief Justice of the Supreme Court of the State of Nebraska, this 8th day of January in the year of our Lord One Thousand nine hundred and ten.

MANOAH B. REESE,
Chief Justice of the Supreme Court
of the State of Nebraska.

Due and proper service of the within citation and the receipt of a copy thereof are hereby accepted, admitted and acknowledged this 15th day of January, 1910.

H. FRED MILLER,
Defendant in Error.
By SULLIVAN & SQUIRES,
His Attorneys.

2952 [Endorsed:] # 15704. In Supreme Court of Nebraska. H. Fred Miller, Appellee, vs. Chicago, Burlington and Quincy Railway Company, Appellant. Citation. Supreme Court of Nebraska. Filed Jan. 18, 1910. H. C. Lindsay, Clerk.

2953 And on the same day, to-wit, on the 8th day of January, 1910, there was filed and lodged in the office of the Clerk of said Supreme Court a certain Supersedeas Bond, approved, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

H. FRED MILLER, Plaintiff and Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defend
and Appellant.

Supersedeas Bond.

Know all men by these presents, That we, Chicago, Burling
and Quincy Railway Company, as principal, and United St
Fidelity and Guaranty Company, as surety, are held and fir
bound unto the above named H. Fred Miller in the full and j
sum of Four Thousand Dollars to be paid to the said H. Fred Mil
his certain attorney, executors, administrators and assigns, to wh
payment well and truly to be made we bind ourselves, our succes
and assigns, jointly and severally by these presents.

Dated this 30th day of December, 1909.

Whereas, lately at a term of the above named court, and in
suit depending therein, between the above named H. Fred Mil
as plaintiff and appellee, and said Chicago, Burlington & Quin
Railway Company as defendant and appellant, judgment
rendered against the said Chicago, Burlington & Quin
266 Railway Company, and it having prayed and obtained
writ of error and filed a copy thereof in the Clerk's office
the said court to reverse the judgment in the aforesaid s
and a citation directed to the said H. Fred Miller citing and
monishing him to be and appear at a Supreme Court of the Uni
States to be held at Washington.

Now, the condition of the above obligation is such that if the s
Chicago, Burlington & Quincy Railroad Company shall prosec
its said writ to effect and answer all damages and costs if it fail
make its plea good, then the above obligation to be void, otherw
to remain in full force and effect.

CHICAGO, BURLINGTON AND QUINCY
RAILWAY COMPANY,
By ARTHUR R. WELLS,
HALLECK F. ROSE, *Its Attorneys.*
UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,
By B. L. BALDWIN, *Attorney in Fact.* [SEAL.]

In presence of:
M. E. FOLEY.

The above and foregoing bond approved by me this 8 day
January, 1910.

M. B. REESE,
Chief Justice of the Supreme Court
of the State of Nebraska.

Endorsed: 15794. In Supreme Court of Nebraska. H. Fred Miller, Appellee, vs. Chicago, Burlington and Quincy Railway Company, Appellant. Supersedeas Bond on Writ of Error. Supreme Court of Nebraska. Filed Jan. 8, 1910. H. C. Lindsay, Clerk.

267 And afterwards, to-wit, on the 18th day of January, 1910, said Citation theretofore issued out of the office of the Clerk of said Supreme Court was returned and filed in the office of said Clerk with service acknowledged in the words and figures following, to-wit:

"Due and proper service of the within citation and the receipt of a copy thereof are hereby accepted, admitted and acknowledged this 15th day of January, 1910.

H. FRED MILLER,
Defendant in Error.
By SULLIVAN & SQUIRES,
His Attorneys."

Endorsed: Supreme Court of Nebraska. Filed Jan. 18, 1910. H. C. Lindsay, Clerk.

268 SUPREME COURT,
State of Nebraska, ss:

I, H. C. Lindsay, clerk of said court do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of H. Fred Miller, plaintiff and appellee v. Chicago, Burlington & Quincy Railway Company, defendant and appellant, No. 15794, and also of the opinion of the court rendered therein as the same now appears on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, Nebraska, this January 22nd A. D. 1910.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

269 UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within and above entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Nebraska, in the City of Lincoln, this January 22, 1910.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

12

Supreme Court, U. S.
FILED
FEB 9 1912
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1911

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,
Plaintiff in Error,
vs.
H. FRED MILLER.

No. 17.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

ROBERT B. SCOTT,
ARTHUR R. WELLS,
Attorneys for Plaintiff in Error.

OMAHA PRINTING CO., OMAHA

22000

Supreme Court of the United States

OCTOBER TERM, 1911

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, *Plaintiff in Error,* vs. H. FRED MILLER.	No. 199

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The case is here upon writ of error sued out by the Railway Company from the Supreme Court of Nebraska.

Sept. 18, 1909, the plaintiff below, Miller, shipped two stallions over the road of the defendant railroad company from Cambria, Iowa, to Weeping Water, Nebraska. One of the stallions died in transit as a result of a fire set out in the bedding of the car in which they were transported. Suit was brought in a district court of Nebraska for the loss of the dead

stallion, and a judgment recovered for $1,200, with interest, which was affirmed upon appeal by the supreme court of that state.

The only question open in this court is whether the supreme court of Nebraska erred in refusing to hold that the amount of the plaintiff's recovery should not exceed $100 because of the fact that he shipped the stallion at a rate based on a declared valuation of $100, pursuant to the provisions of the duly published tariffs of the railroad company filed with the Interstate Commerce Commission. It appeared in evidence that the railroad company had published rates on horses (including stallions) ranging in amount according to the different declared values put upon each animal at the time of shipment. (Defts Exhibits 9 and 10, printed record pp. 42-44; testimony of Hal Buckingham, P. R. pp. 32-34, Qs. 723-776.) In this case the plaintiff or his representative had declared the value in writing of each animal to be not to exceed $100 and the rate was assessed on that value. (Defts Ex. 2; P. R. opposite p. 40; stipulation P. R. p. 34, following Q. 775.) According to the published interstate tariffs of the railroad company the rate on an animal valued at $1,200 would have been 3¼ times greater than the rate paid by plaintiff.

It was at all times in the state courts insisted by the railroad company by appropriate pleadings, objections to evidence, requests for instructions, and assignments of error, that the necessary effect of the interstate commerce act in its requirements that rates be published, maintained and not departed from, was to prevent the plaintiff from recovering more than $100 for the loss of the stallion in question, which contention the state supreme court overruled.

The sections of the Iowa Statutes and the Nebraska Constitution, upon which plaintiff relied, and which the Nebraska Supreme Court held invalidated the defendants tariff regulations, were the following:

Section 2074 of the Iowa Code:

> "No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into."

Section 4 of Article XI. of the Constitution of Nebraska:

> "The liability of railroad corporations as common carriers shall never be limited."

SPECIFICATION OF ERRORS.

The plaintiff in error alleges that the Supreme Court of Nebraska erred in holding that the rules and regulations contained in the published tariffs of the plaintiff in error, which required the shipper to declare the value of his animals and be bound thereby, were invalid, and that the rights of the parties hereto were determined by those provisions of the Constitution of Nebraska and the Statutes of Iowa relied upon by the defendant in error, and in affirming the judgment of the trial court for an amount in excess of $1000.00 and interest.

BRIEF OF ARGUMENT.

I.

THE INTERSTATE COMMERCE ACTS NOT ONLY GIVE THE CARRIER POWER BUT EXPRESSLY REQUIRE IT TO PUBLISH IN ITS TARIFFS SUCH RULES AS THAT RELIED UPON BY THE DEFENDANT.

Section 6 of the Commerce Act, is of controlling importance in determining this case, and it is essential that its provisions be examined in detail. As amended June 29, 1906, 34 Stat. L. 586, it provided:

"Whereas, the first party, in order to avail himself of said alternative rates, and to secure the benefits thereof, has declared and does hereby declare said animals to be of the value as follows, to-wit:

"Each horse value $100.00

To which value the rate aforesaid is proportioned by the classification and tariffs aforesaid:

"Now, in consideration of the premises and of the foregoing, it is expressly agreed that for all purposes connected with, resulting from, or in any manner growing out of this contract, and in the transportation of said animals and of each thereof, shall in no case exceed the said valuation.

"It is further agreed in consideration of the alternative rate so made by the said Railway Company and accepted by the first party, that in case of loss of or damage to said animals, whether resulting from accident or negligence of said Railway Company, or its servants, the said Railway Company shall not be liable in excess of the actual loss or damage, and in no case shall the Railway Company be liable in any manner in excess of the agreed valuation upon each animal lost or damaged."

It is conceded by the appellant that when said contract was made, the law in force in the State of Iowa (Sec. 2047 of its code) was as follows:

"No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transferring persons or property from the liability of a common carrier or carrier of passengers which would exist had no contract, receipt, rule or regulation been made or entered into."

That part of Section four, Article Eleven, Constitution of Nebraska bearing upon the issues is as follows:

"The liability of railroad corporations as common carriers shall never be limited."

Section Seven of the *Hepburn* Act purports to amend Section Twenty of the Inter-state Commerce Act and the Eleventh Paragraph of Section Twenty as fixed by this amendment reads as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for *any* loss, damage or injury to said property *caused* by it or by any common carrier, railroad or transportation company to which property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability *hereby imposed:* Provided that nothing in this Section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

VARIOUS INTER-STATE COMMERCE ACTS.

Leaving out of view certain minor amendatory acts, there are four principal Inter-state Commerce Acts which concern us in this case. The first one was passed in 1887. This provided for the establishment of an Inter-state Commerce Commission and required common carriers to file with this Commission its rates and tariff schedules, and made it unlawful for the carriers to descriminate between shippers or to vary from the schedules filed. It provided for a penalty in the nature of a fine only, not to exceed $5000.00, to be visited upon the carriers in the event of a violation of this law. The schedules of rates, a copy of which was required to be filed with the Commission, was required to set forth, in addition to other matters "*any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges.*" This provision is almost identical in its language as that found in the corresponding Section in the later Act known as the *Hepburn* Act, made so much of by the Company, and which is as follows:

"Any rules or regulations which in anywise shall affect or determine any part or the aggregate rates, fares and charges, or the value of the service rendered to the passenger, shipper or carrier."

All decisions, both state and federal, bearing upon the issues in this case since the year of 1887 have been made in view of this provision of the law. The effort of appellant, therefore, to derive support of their contention based upon this provision in the Hepburn Act can be of little or no avail to them. So far as this clause is concerned the decisions prior to the *Hepburn* Act are just as applicable to the issues in this case as would be the decision since the *Hepburn* Act.

The first section of this original Inter-state Commerce Act defined the scope of the Act, and the Court will notice that the 1887 Inter-state Commerce Act, as shown by Section One therein, was just as plenary and comprehensive as the Inter-state Commerce laws are today. It was the plenary character of this original Act of 1887 that was commented upon in T. & P. vs. I. C. C., 162 U. S. 197 and Armour vs. U. S. 209 U. S. 56.

The second Inter-state Commerce Act was passed in 1889 and was amendatory of the original Act. By this amendment the penalty of imprisonment was added to the fine, originally provided for, and the penalty was made to apply both to the carrier and the shipper. This amendatory Act also made some slight changes in the notice required to be given by the carrier when the rates were to be altered. This Act provided against false billing, etc., and the provisions with reference to the same were in substance as that in the law at the time this suit was brought, except the penalty attached only when undue advantage was obtained thereby *knowingly* and *wittingly*.

The third Act was known as the Elkins Act and was passed in the form of an original bill in 1903. This Act abolished the penalty by imprisonment and made *carriers and shippers liable regardless of motives*. If by any device whatsoever, whether fraudulent or not, a discrimination was worked in the rates charged, the carrier and shipper were subjected to a penalty whether the same was consummated knowingly or not.

This Act purported to be for the further regulation of Inter-state Commerce. It had no effect upon the general scope of the Inter-state Commerce law and did not alter the original Act, so far as the same concerns us, to any substantial extent other than herein specified.

The last Act before this suit was brought, was passed in 1906 and was known as the Hepburn Act. This was an amendatory Act.

The Hepburn Act is very specific and is designed to render more perfect the prior Inter-state Commerce laws. While it is very much more effectual than they to prevent unreasonable charges and discrimination among shippers, increasing the number of specific requirements and prohibitions, fixing larger fines and restoring the penalty of imprisonment for violations of the law, still, as to Railroad Companies, it covers the same field as the 1887 law. As to such Companies, we submit that the old Act of 1887 was just as much a *complete system* of laws on the subject of Inter-state Commerce as the present law. The 1887 law (Sec. 1) as does the present law, provided for a Commission (Sec. 11) As does the present law, it provided for filing with the Commission its public schedules (Sec. 6), which by specific requirement "shall also state * * * * * any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges." As does the present law, it forbade a deviation from these schedules (Sec. 6) and makes a deviation therefrom punishable as a crime. As does the present law, it, with the amendment of 1889 made a preference obtained by *false billing or false classification* a punishable offense. (Sec. 10).

It is also settled in Nebraska that while the ordinary rule is that the law of the place of making the contract is controling in its construction, there is a modification of this rule in the case of the liability of the carrier to the shipper where the rule in a foreign state is against the public policy of Nebraska. In that case the contract is subject to the law of Nebraska, and construed and limited by its provisions; and whatever is the rule as to liability where the contract is made, in a Nebraska forum, a carrier cannot escape full liability for the value of the property it injures or destroys.

C. B. & Q. R. Co. vs. Gardner 51 Neb. 70.

While such is the rule of liability for damages in Nebraska, this rule is applicable alike to inter-state and intra-state shipments. In St. J. & G. I. Ry. Co. vs. Palmer 38 Neb. 463, in the syllabus, our court says:

"A Railroad Company in the carriage of goods is subject to the liability of a common carrier and must answer for all losses not occasioned by the act of God or the public enemy and cannot in this state by special act limit or relieve itself from this liability."

"The fact that the contract was made for the carriage of goods from a point in this state to a point in another state does not change the rule."

In the body of the opinion the court says:

"It was not intended and should not be construed as a means of relieving a carrier from liability because its own agents had committed an error."

"But it is argued that upon general grounds the whole subject matter of inter-state transportation was by the constitution placed within the power of Congress, and that Congress having enacted the inter-state commerce act assumed such jurisdiction and thereby nulified existing state laws. That not only the acts of Congress must be treated upon the subjects as the supreme law of the land, but that the decisions of the federal courts must be accepted as the final statements of law, prevailing against state statutes and state decisions. Without discussing the question as to whether

the federal decisions are opposed to the constitutional and statutory provisions of this state, referred to, it is sufficient to say that we cannot accept the rule of the railroad company as above outlined."

The Nebraska court takes the view as set forth in 85 Neb. 458 that the constitution and judicial decisions of this state are not in conflict with any federal statutes and are therefore in no way affected by federal decisions, or the provision in the inter-state commerce law that the shipper must file its schedule of rates and every rule or regulation which shall in any way affect any part or the aggregate of the rates charged by a carrier.

IOWA CASES.

Under the Iowa statute, as construed by its courts, a carrier cannot by contract exempt itself from liability or limit the amount of its liability at less than the real value of the property destroyed or injured. The shipper cannot be estopped by a special contract from recovering the full amount of damage he has suffered by the dereliction of the carrier.

Hart vs. N. Y. Ry. Co. 29 N. W. (Ia.) 597.
Solan vs. C. M. & St. P. Ry. Co. 63 N. W. 692.
Lucas vs. B. C. R. & N. Ry. Co. 84 N.W. (Ia.)673.
Winn vs. Am. Ex. Co. 128 N. W. (Ia.)663.
Betus vs. C. B. & Q. Ry. Co. 129 N. W. 962.
Cramer vs. C. R. I. & P. R. Co. 133 N. W. (Ia.)387.

Nor can the shipper be estopped by the fact that he misrepresented the value of his property to procure a lower rate; that is, in that state there is no estoppel in pais independently of the validity or the invalidity of the contract.

Lucas vs. B. C. R. & N. Ry. Co. 84 N. W 673.
Betus vs. C. B. & Q. Ry. Co. N. W. 962.

The above cases cited hold also that this rule in Iowa is applicable to both inter-state and intra-state shipments, that it is an exercise of the police power of the state and is in no proper sense a regulation of interstate commerce.

This rule in the judicial view of that state is not in conflict with any federal statute, or governed by any federal law. It is expressly held that this rule in that state is in no way modified or affected by paragraph eleven of Section 20 of the Hepburn Act.

128 N. W. 663; 129 N. W. 962.

That is to say, Congress has never passed a law, as that court holds, which is in conflict with the Iowa statute, and therefore the Iowa statute has never been set aside by any congressional enactment and is in full force.

The exact questions raised in the case at bar was before the Iowa court in a case decided within the last few days. In this case it was contended by the Railway Company that under the inter-state commerce act requiring the company to file its schedule of rates and every rule and regulation which in any way affected any part or the aggregate rates charged the carrier was intitled to file a schedule of rates based upon values declared by the shipper just as was done in the case at bar, that when the carrier so declared the rate, that rate had the force of law and could not under penalties be deviated from. That by virtue of such rate fixed, in that way, the carrier had a right to execute a valid contract similar to the one in the case at bar, and that the shipper is estopped by that contract from claiming damages different from the amount mentioned in the contract. The court therein held that the contention of the railroad company was not sound, and that there was no federal statute which either by express terms or necessary inference prohibited the Iowa rule, that therefore there was no conflict between the federal statutory law and the Iowa statute, and that the Iowa rule is still in full operation.

Cramer vs. Ry. Co. 133 N. W. 387.

Thus it will be seen that under the decisions of Cramer vs. C. R. & P. Ry. Co. 133 N. W. (Ia.) 387 the courts of both Nebraska and Iowa every phase of the questions raised

in the case at bar had been passed upon and settled, and that under the settled law of both of those states a shipper cannot be estopped either by contract or by the representation of the value of his property in order to procure a definite rate, to recover from a carrier—the full amount of damage caused by it.

FEDERAL DECISIONS RELATING TO THE SUFFICIENCY OF STATE STATUTES AND STATE LAWS PROVIDING FOR THE RULE OF DAMAGES SUCH AS FOUND IN THE IOWA RULE.

State statutes, such as the one in Iowa, and state rules of law of like nature, whether same have been established by statute, constitution or judicial interpretation, prohibiting carriers in case of shipments, both inter-state and intra-state, from limiting their liability to the shipper have been passed upon by this court and by it ratified and approved, and by it established as existing law.

169 U. S. 133 R. R. vs. *Solan.*
191 U. S. 477 R. R. vs. *Hughes.*
203 West 284 *Martin* vs. R. R.

The court will note that the *Solan* case was decided in 1898 long after the first inter-state law and its amendment of 1889 were in effect: the *Hughes* case in December, 1903, after the Elkins law was passed; and the *Martin* case in December, 1906 after the *Hepburn Act* was passed.

Such statutes and laws have been repeatedly held by this court to be within the police power of the state, and in no sense a regulation of inter-state commerce.

Solan case 169 U. S. 133.
Hughes case 191 U. S. 477.
Western U. T. Co. vs Commercial Milling Co. (1910) 218 U. S. 406.

In the Solan case speaking of the Iowa statute and rule of liability of carriers it is said:

"The rules prescribed for the construction of railroads, for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulation of inter-state commerce although they control in some degree the conduct and liability of those engaged in such commerce. *So long as Congress has not legislated upon the particular subject* they are to be regarded as legislation in aid of such commerce and as a rightful exercise of the police power of the state to regulate the relative rights and advantages of all persons and corporations within its limits."

Again in the same case it is said with reference to the Iowa statute:

"It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the Company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares or freight."

In the Hughes case, which is a case remarkably similar to the one in principle at bar, it was said:

"The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence a contract to the contrary notwithstanding."

The Hughes case, we think, is decisive of this case unless there is something in the *Hepburn* Act to change the rules of liability in force. In that case the shipment was from some point in New York to some point in Pennsylvania. The rate charged was apportioned to the value of the animal as fixed in the agreement and the carrier sought to limit its damages to the agreed value. While there was no statute controlling the question of limitation of liability in Pennsylvania, yet the rule was recognized in that state that a carrier could not limit its liability to less than the real value of

the property destroyed or injured, and the court enforced the Pennsylvania rule of liability. This court, after referring to the *Elliot case*, 184 U. S. 533, as authority for its jurisdiction and the right to review the case therein, said:

"In refusing to limit the recovery of the valuation agreed upon did the state court deny to the company a right or privilege secured by the inter-state commerce law? It may be assumed that under the broad power conferred upon Congress over inter-state commerce as defined in repeated decisions in this court, it would be lawful for that body to make provision as to contracts for inter-state carriage permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon, *we fail to find any such provision therein* * * * * *There is no sanction of agreements of this character limiting liability to stipulated valuations*, and until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulation upon the subject, although it may to this extent affect inter-state commerce contracts of carriage!"

The court in this decision answers this question in the negative, and this, in view of the fact that Congress had already passed a comprehensive and plenary system of law, touching the regulation of inter-state commerce. The court held this notwithstanding the law required carriers to file with the inter-state commerce commission their schedule of rates and to file also "any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee."

It was further said in that case: "While under these provisions (referring to the provisions of the inter-state commerce law) it may be said that Congress has made it obligatory to provide proper facilities for inter-state carriage of freight, and has prevented carriers from obstructing continuous shipments on inter-state lines. *We look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations*, and until Congress shall legislate upon

it, is there any valid objection to the state enforcing its own regulations upon the subject although it may to this extent indirectly affect inter-state commerce contracts of carriage?"

"It is well settled that the state may make valid enactments in the exercise of its legislative power to permit the welfare and convenience of its citizens although in their operation they may have an effect upon inter-state traffic."

"In M. K. & T. R. Co. vs. Haberd 169 U. S. 614, after reviewing previous cases in this court, Mr. Justice Harlan delivering the opinion of the court says: "These cases all proceed upon the ground that the regulation of enjoyment of the relative rights and the performance of the duties of all persons within the jurisdiction of a state belonged primarily to such state under its reserved power to provide for the safety of all persons and property within its limits, and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress and be reached by national legislation, any action taken by the state upon that subject, that does not directly interfere with rights secured by the constitution of the United States, or by some valid act of Congress, *must be respected until Congress intervenes.*"

It is further said in this opinion while discussing the Solan case which arose in Iowa:

"It is true that this language was used by a statute of Iowa enacting a rule of obligation for common carriers in that state, but the principle recognized is *that in the absence of Congressional legislation upon the subject, a state may require a common carrier although in the execution of a contract for inter-state carriage to use great care and diligence in carrying passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge its duties.*"

Thes decisions settle the question that until Congress shall enact a provision which shall conflict with the law of a particular state, and shall validate such contracts for limitation of liability such as exists in the case at bar, the law of the state must control.

THE CARMACK AMENDMENT TO THE HEPBURN ACT OF JUNE 29, 1906, DOES NOT ABROGATE THE IOWA RULE THAT THE COMPANY CAN IN NO WAY LIMIT ITS LIABILITY, BUT ON THE CONTRARY INCORPORATES THAT RULE INTO THE BODY OF THE FEDERAL LAW SO THAT IN OUR VIEW THE FEDERAL STATUTE FORBIDS THE COMPANY IN THIS CASE TO LIMIT ITS LIABILITY.

Certainly it may be taken as settled that at the date the *Hughes* case was decided (1903) this court found nothing in the Federal Statutes in conflict with the Iowa and Nebraska rule of non-limitation of liability. The Elkins Act cannot properly be said to have bourne upon the question or in any way to have affected or changed the situation. The Hepburn Act and the Carmack Amendment to it is the first and only statute affecting the rule and to this alone we look to see whether or not the Iowa rule is changed.

We are aware that several state courts have variously construed the Carmack Amendment and have found in their view that it did not alter the local state rule of liability. On page 20 of the company's brief is found a list of such decisions. As far as we are able to learn in each of the states from which the citations are made, there is no statute or law such as is in Iowa and Nebraska forbidding railway companies to limit their liability and in each of those states it has been held that for a consideration a company may limit its liability; and in each of those states the court has held that the Carmack Amendment was designed to adjust the liability of connecting carriers to the shippers and have so construed the statute that it did not contravene the operation of the local state rule that a company could for a consideration limit its liability.

In this connection the Iowa State Court has held that the Carmack Amendment did not contravene the local Iowa State rule.

Cramer vs. Ry. Co. 133 N. W. (Ia.) 387.
Betus vs. C. B. & Q. R. R. Co. 129 N. W. (Ia.)962.
Winn vs. Am. Ex. Co. 128 N. W. (Ia) 663.

See also:

Latta vs. Ry. Co. 172 Fed. 850.
Miller vs. C. B. & Q. Ry. Co. 85 Neb. 458.
T. & S. F. Ry. Co. vs. Rodgers 113 P. 80.
Ry. Co. vs. Pew 64 S. E. (Va.) 35.

In our view, however, we hold that the Carmack Amendment by necessary construction of language brings the Federal Statutes into perfect accord with the Iowa and Nebraska rule, and expressly forbids a railway company from limiting its liability for its own negligence.

It provides: "That any common carrier * * * * receiving property for transporation * * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for *any loss*, damage or injury to said property *caused by it*, etc."

It seems to be the universal rule that a carrier while its liability is that of an insurer, may for a consideration limit its liability as to causes of loss beyond its control. This statute clearly deals only with loss "*caused*" by the carrier, and the carrier is clearly made liable for loss due to its negligence, which is the situation in the case at bar.

It is to be noted that the carrier is here made liable for "*any loss* damage or injury." The use of this word "any" is of paramount importance. "Any" in this context means "all."

1st Words and Phrases 421.
Monongahela Nav. Co. vs. Coon 379-47 Am. Dec. 474.
2 Cyc. 472 (note 21)
Jones vs. Whitworth 30 S. W. (Tenn.) 736.
L. N. R. Co. vs. Mottley 219 U. S. 479.

The word "loss" has the broadest significance. It means whatever one may be deprived of. It cannot be limited to a certain measure of damages which a court may see fit to award in a given case as was done in the *Hart* case. 112 U. S. And when the statute makes the carrier liable for any loss "it causes", it necessarily makes it liable for all loss it causes. If the carrier may carve out a portion of its liability, it clearly ceases to be liable for "all loss". To say that a carrier may limit the amount for which it will be liable in case of a "loss" is to contradict the express language of the Carmack Amendment.

We think in the decisions cited by the Company, the courts have overlooked the full import of the words "loss" and "any loss." If the statute provides by language necessarily so defined that the carrier shall be liable for all loss it shall cause, how then can it be successfully contended that a carrier may limit its liability to a part of the loss it causes.

To make certainty doubly certain this statute further provides: "and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability *hereby imposed*."

Now the writer is aware that it is by some courts argued that the words "hereby imposed" imply a liability created by this statute and which did not exist before. We reply, first, that even if the clause quoted in the preceding paragraph had been eliminated from the statute it could not change its meaning for it previously provides that the carrier shall be liable for all loss it causes; secondly, we say that the provision making the carrier liable for "any loss" it "caused" so far as the rule in the Federal Courts is concerned *creates a new and larger liability*. The *Hart* case had decided, in certain conditions, a carrier could limit and define the damages for a loss although the loss suffered might be a thousandfold more. This statute in our view provides that the carrier must pay the full loss suffered by the shipper. This is a new liability which did not previously attach to the carrier; it is a liability "hereby imposed." Third, we reply

that this statute undertakes to state the liability of the original carrier to the shipper for the loss it causes as well as that caused by the connecting carrier. The liability is one "hereby imposed" whether it is declaratory of the common law or not. A statute has positive force as we view it although it may be declaratory of the common law. But in this connection the various courts had promulgated conflicting rules of the measure of liability. Congress by statute sought to settle the rule and to make the carrier liable for whatever loss it caused. Henceforth the courts were to look to this statute for guidance and not to any preconceived notions of what the common law might be. In a very proper sense then, Congress could refer to the carrier's liability stated in the statute as one "hereby imposed."

If we read the decision in the matter of Released Rates aright, 13 I. C. Rep. 560 the Interstate Commerce Commission holds to our construction of the Carmack Amendment and that as a matter of contract the carrier cannot limit its liability for its negligence in whole or in part, and this is what it means when it says: "From these words it would seem to be clear that the law will not permit a carrier to stipulate against the consequences of its negligence, either wholly or in part. A stipulation can not attain validity merely because it appears in the guise of a fictitious agreed valuation.

But if there were room for any difference of opinion on this point prior to the enactment of the Hepburn Act, the passage of that measure has removed all uncertainty. The act expressly invalidates all stipulations designed to limit liability for losses caused by the carrier. Irrespective of a contract or notice limiting the amount of recovery, the carrier cannot escape liability for full value in event of loss due to its own negligence or other misconduct, except in the single instance where the shipper has misled the carrier by his misrepresentation or concealment of value and estopped himself from recovering more than the value he has disclosed."

As to the estoppel mentioned in the foregoing quotation we will deal in a later subdivision of this brief.

In passing this Act, Congress had chiefly in mind to compel the carriers to be fair with the shipper and to prevent discrimination. It had arranged that all rates should be payable in cash, should be publicly promulgated and should not be departed from. It knew that the carriers had ever sought to escape liability for full and complete damages arising from their negligence. They had first provided arbitrarily for complete evasion of liability even for gross negligence; then by their contracts had limited their liability to a specific sum; then in a consideration of lower rates had contracted against liability of all kinds; then by offering a choice of rates, the alternative being unreasonable and disproportionate, had sought to force contracts of partial liability; and had now hit upon the plan of apportioning rates and limiting liability to an agreed valuation altho this agreed valuation was arbritary and unreasonable. They had slowly receded from one position to another as the courts had driven them back, but in the process of retrocession there had arisen a maze of conflicting judical decisions and a variety holding as to the rules of damages. It remained for Congress to bring harmony out of this chaos and to protect the shippers from the well laid plans of the carriers to avoid their just liability by enacting this law and thereby saying to them "you shall not escape the just consequence of your negligence. You shall pay for all the loss you cause. Why not? We are protecting you with adequate rates. You should be fair and stand good for your wrong doings." And so it enacted a law as we think which adopts the Iowa and Nebraska rules of non-limitation of liability, and thus took another step forward in its grand purpose evidenced by the whole scheme of the interstate commerce law to protect the shipper against the encroachments upon his rights by the carriers.

If we are right in our construction of the Carmack Amendment then it is idle to talk about estoppel. There can be no estoppel by a contract which contravenes the statute. There can be no estoppel by a rule or regulation of the carrier whether it applies to rates or anything else when the

statute says in effect that such rule or regulation shall not work an estoppel or exempt the carrier from full liability for loss caused by it.

16 Cyc. 720.

Instead of the Federal Statutes striking down the Iowa statute and the Nebraska constitution as to non-limitation of liability by conflict therewith, it exhibits no conflict and is in perfect accord with them.

THE CARRIER CANNOT, BECAUSE IT FILED WITH THE COMMISSION A RATE PROPORTIONED UPON A DECLARED VALUATION, IN THIS CASE, SHIELD ITSELF FROM FULL LIABILITY FOR LOSS CAUSED BY IT.

There is no Federal decision upon this point. The Company in its brief has cited no case bearing precisely upon it. The only case we knew of is from the state of Iowa, and there, in a well reasoned opinion, dealing with the exact point argued in the Company's brief, arrives at the conclusion that by filing such a rate the carrier cannot escape full liability for its negligence.

Cramer vs. C. B. & Q. Ry. Co, 133 N. W. (Ia.)388.

The syallabus in that case succinctly states the points of the opinion as follows:

1. Code 2074, providing that no contract, receipt, rule or regulation shall exempt any railway corporation from the liability of a common carrier, and thereby invalidating contracts between railroads and shippers whereby the former attempt, by means of an agreed valuation of the goods shipped, to limit their liability for negligence, having been passed before Congress acted in the matter of inter-state commerce and assumed control thereof, is not invalidated by the

action of Congress, for such action does not deprive the states of their right to enact such rules by virtue of their police power.

2. The mere filing of schedules of rates with the Inter-state Commerce Commission raises no inference that the Commission agrees to such rates, or all the proposed conditions of shipment.

3. As the filing of schedules of rates raises no inference that the Inter-state Commerce Commission agreed to them, or the proposed conditions of shipment, the mere filing of a schedule by a railroad company, in view of the fact that when the schedule was filed the Commission had no authority to fix rates for future shipments, and no power to issue general orders to carriers, and in view of U. S. Comp. St. Supp. 1909 p. 1166, amending Section 20 of the inter-state commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169) and providing that the initial carrier shall be liable for the negligence of any connecting carrier despite any contract, receipt, rule or regulation to the contrary, will not validate a condition in such a schedule, limiting the carrier's liability for negligence, by means of an agreed valuation of the goods shipped, and thus abrogate Code 2074, which makes such a contract void.

4. When an inter-state shipment was made under a contract, providing that if the stock shipped was injured the shipper should obtain no compensation beyond an agreed valuation was invalid does not give the shipper a rebate, but only compensation for loss suffered, which is not a lower rate than he is entitled to.

5. Where a railroad company filed two rates with the Inter-state Commerce Commission, the lower providing for an agreed valuation of live stock shipped, which condition was invalid, under the State law, for limiting the railroad company's liability for negligence, a decision that the shipper might recover despite the condition, while giving him all the benefits of the higher rate, is not erroneous in giving the shipper a less rate than required by law, because of the filing of the schedule of rates with the Inter-state Commerce Commission, for the validity of the agreement limiting the car-

rier's liability for negligence cannot be assumed to have been approved by the Commission, when invalid under the state law.

See also:

Ry. Co. vs. Pew 64 S. E. (Va.) 35.

We wish to call the court's attention to the fact that the contract of shipment set forth the alternative of rates offered the shipper. If a provision for limited liability for *negligence* was filed with rates and schedules with the Inter-state Commerce Commission it is a mere gratuitous statement and is no part of the rate charged, and is in violation not only of the Iowa and Nebraska law, but *is in violation of the express language of the Carmack Amendment* as we interpret it. Certainly a carrier, altho it must file its rates and all rules or regulations affecting a part or the aggregate thereof, cannot couple therewith a condition that violates the positive provisions of the congressional enactment. Such a holding would render the carriers more powerful than Congress and permit them to defy the Congressional will. In the Carmack Amendment it is provided that the carries *shall be liable for all loss caused by it and no contract, rule, receipt or regulation shall exempt it from this liability.*

Furthermore the court on reading the contract of shipment and also the rate filed with the Inter-state Commerce Commission (R. 43), which latter does not provide in terms for limitation of liability in the event of negligence, will see that the provision for liability has no effect whatever upon the freight rate charged, and *the freight rate is in no way conditioned upon this partial liability.* The rate is apportioned to the declared valuation. If the value is $100.00, the freight rate is a definite amount, if the value is $200.00 the rate is 25% higher, and for each additional $100.00 of valuation the rate is boosted an extra 25%. Then it is provided in consideration of the rates so fixed, the carrier's liability is limited to the valuation fixed. *No rate is offered so far as the contract shown or the record in this case shows con-*

dittoned upon full liability or any other liability. This provision for limited liability has nothing to do with the amount of the rate. That is determined by the valuation. And the carrier has simply grafted upon the rates fixed the gratuitous provision that its liability shall be limited. Such a provision cannot be contemplated by the statute requiring to be filed with the Inter-state Commerce Commission "any rules or regulations which *in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges or the value of the services rendered.*" To impose upon the carrier full liability for its negligence, clearly would not compel it to depart from the rate filed with the Commission nor in any degree affect the amount which by law it would collect for the carriage and services rendered.

We are aware that rates must be filed with the Commission, that such rates so filed until properly altered have the force of law and cannot be departed from, also that remedies for improper rates and damages because an improper rate must be sought in another form. *But this action does not involve a question of what is a proper rate, or what rate should be charged, nor are we seeking damages for an improper rate. It has nothing to do with rates whatsoever.* The freight has never been paid in this case and the carrier is at liberty to collect whatever charge is legal and right. We are making no contention as to that. After the carrier got our horse and at a subsequent time by their negligence they burned it up. Out of this separate and distinct transaction arose our cause of action. It does not arise out of the contract of shipment or the question of rate charges. The Company in its brief has sought to connect our cause of action with this question of rates, but we think with no avail.

It is argued that the courts have approved of a rate apportioned according to the value of the property. We do not wish to take issue with this proposition. But the Company cannot hide behind a valuation simply because it is a value

declared by the shipper. *The question of value as a basis of rates is no more a subject of contract than any other feature tending to make freight rates fixed and certain and to prevent discrimination.* The value must be the true value or so near such as to stamp the proceedings with bona fides. The Federal Statute provides *that there shall be no false classification and no false billing.* It further provides for penalties for false classification and false billing whether done knowingly or not. To charge a rate upon a false value is to fix a false classification. Such a rate forbidden by law would bind neither carrier nor shipper.

T. & P. Ry. Co. vs. Muggs 202 U. S. 242.
Ry. Co. vs. Heffley 158 U. S. 98.
T. vs. Abiline Oil Co. 204 U. S. 431.

The law, then, if it authorizes the shipper to file a rate apportioned to the value must necessarily contemplate that the true value will be fixed. If this were not so, one man might ship the horse under a false value and another more honest be compelled to pay a higher rate for precisely the same service. This inequality would be a violation of the rights prescribed by the Federal Constitution and a violation of the spirit of the Inter-state Commerce Law which seeks to prevent discrimination between shippers. The rate must be based upon the true value ofthe property otherwise the provisions of the Statute against false classification and false billings would be rendered nugatory. If the true value is fixed the rate will be proper and under such circumstances no good reason can be given why the Company should not be liable for the true value as found by the jury. In this connection it must not be forgotten that the freight charge in this case is not settled and the Company is at liberty to collect the correct charge.

The court will bear in mind that the schedules filed while they contain a parenthetical clause that the carrier's liability is limited to the rules named does not indicate un-

der what conditions this limitation exists. It should not be construed to be in conflict with the Carmack Amendment. And if the latter receives the interpretation we give it, it will not be held to apply to damages for negligence.

Furthermore it is a familiar principle in the law of contracts that a provision for the limitation of liability unless it specifically so recites will not be construed to apply in the event of negligence on part of the carrier. It seems to us this principle applies in the construction of the schedules made, offered and filed by the carrier. The salutatory principle that the carrier should not escape the consequence of its negligence should not be lightly set aside and its language should not be interpreted to contravene the well settled principles of public policy unless such interpretation is unavoidable. If the language of the schedules is not so interpreted and if the limitation of liability therein mentioned does not apply in the event of the negligence of the carrier, *it is not a departure from the schedules filed when the carrier is held fully to such liability as arises from negligent conduct.*

MILLER IS NOT ESTOPPED IN THIS CASE TO RECOVER THE FULL VALUE OF THE HORSE BURNED.

In the facts of this case there is absolutely wanting the essential elements of an estoppel. In the first place there was no concealment of the property. The Company's agent could see the horse, had access to him, knew it was a stallion and must have known by observation that it was a more than usually fine animal. He must have known as any child would know that such property was worth more than $100.00.

In the second place *it was not the shipper but the carrier that actually fixed the value* and the carrier could not have

been misled. This is shown by the evidence as hitherto pointed out. Moreover on examination of the pleadings it will appear that the Company averred that the shipper placed a value on the horse (R. 4). This the shipper denied (R. 6). In the instructions of the court, while the jury were instructed that the contract limiting liability was as a contract void and that the stipulation in the contract fixing the value of the horse at $100.00 as a stipulation was void and not binding, yet nowhere did the court take from the jury the question of estoppel, that is, the question whether the plaintiff represented the value of the horse to be $100.00 and thereby the carrier was misled independently of any contract and the jury must be held to have passed upon this question. And when it found for the plaintiff it must have settled the question of fact that the carrier and not the shipper fixed the value stated in the contract. When the carrier seeks to hide behind the statement in this contract that the shipper declared the value, it hides behind a false and empty form.

Third, the carrier in this case is not misled to its hurt for it has never collected the freight charges, is bound by no valid condition that it shall not collect the correct charge and is at liberty now to collect the same.

Fourth, the question of estoppel by reason of misrepresentation (independent of the validity or invalidity of the contract) involves the construction of no Federal Constitutional or statutory provision, but rests wholly upon considerations of general law which each state has a right to determine for itself. *No Federal question is involved* and this appeal from the State Court cannot be sustained on this ground.

If the court holds that the provision for limitation of liability cannot properly be considered as a part of the rate schedules filed, and if the court further holds that under the Carmack Amendment the contract limiting liability for negligence is void as a contract but also holds that the Carmack Amendment does not forbid the operation of estoppel as ap-

plied in the Hart case, then we contend that this question of estoppel is devoid of any Federal question and could have been decided by the State Court without passing on any Federal question and this case should be affirmed.

Burdock vs. Memphis.	26 Wall 590. 22 Co. op. 429.
Gibson vs. Conteau.	8 Wall 314. 19 Co. op. 317.
Swope vs. Leffingwell.	105 U. S. 3. 26 Co. op. 939.
Gillis vs. Stinchfield.	159 U. S. 658. 40 Co. op. 295.
Sherman vs. Grinnell.	144 U. S. 198. 36 Co. op. 403.

Furthermore we think the pleadings are insufficient to permit the carrier to stand upon an estoppel. It does not appear in the allegations that the Company did not know the true value of the horse or that it relied upon the alleged representations of the shipper. There is no sufficient allegation of fraud or deceit on the part of the shipper or of injury on the part of the carrier.

HART CASE.

We come now to a consideration of the Hart case 112 U. S. 331. We assume for the sake of the argument only that this court may take the view that the Carmack Amendment did not forbid the operation of the rule in the Hart case and may hold that it might be applicable in this case and that under proper circumstances a carrier could limit its liability for its own negligence to the agreed value of the property upon which was graduated the freight rate charged. Then we say that the case at bar is not one which under the rule of the Hart case permits of a limitation of

liability, because, First, the alternative of rates offered is so arbitrary and unreasonable as to show a purpose of forcing an acquiescence on part of the shipper to the lower rate and thus to procure a limitation of liability; Second, the value fixed is not fairly made, the variation from the true value being so great as to show bad faith and that the same was arbitrarily made for the purpose of obtaining a limitation of liability.

It will be noticed at the start that the Hart case came up from the Federal Circuit Court, that the decision went upon the ground of estoppel and the application of the principles of general law which every state may determine define and apply for itself as it may deem proper. It did not turn upon a consideration of any statute or of any Federal question.

The court said in this case: *"It does not appear that an unreasonable price would have been charged for a higher value."*

In a situation where the rate was fixed at a definite amount with limited liability in a proper case on the part of the carrier and made 20% higher with full liability the Interstate Commerce Commission condemned the discrimination as unreasonable and directed the carriers to revise their contracts making the discrimination less.

Released Rates 13 I. C. Reps. 565.

It is in this report said: "A certain differential between rates which leaves the carrier's liability unlimited and rates which provide for a limited liability is obviously proper, but the differential should exactly measure the additional insurance risk which the carriet assumes when the liability is unlimited. An increased charge of 20 per cent. is manifestly out of all proportion to the larger risk involved, and its virtual effect is to restrict the public to rates calling for limited liability. Herein lies the vice in stipulation of this character. It is a mischevous practice for carriers to publish in their tariffs and on their bills of lading rules and regulations which are misleading, unreasonable, or incapable of literal enforcement in a court of law."

If a 20 per cent. differential is unreasonable, what will the court say in the case at bar where the rate is boosted 25 per cent. for every hundred dollars of contractual liability! Or where the rate for full liability is 150 per cent. more than for limited liability as is now so generally done.

I know it will be argued that relief from unreasonable rates must be sought in another form. But we are not seeking such relief but seeking only to interpret the contract of shipment and to ascertain whether it is intended merely to limit liability. As a matter of logic we have a right to show that the alternative of rates presented is unreasonable, made so simply to force consent of the shipper to agree to limited liability and that therefore the contract must be construed as one designed not to procure a reasonable proportion between the risk assumed and the freight charged, but to obtain a limitation of liability for negligence and one that is unreasonable and void.

Cramer vs. Ry. Co. 133 N. W. (Ia.) 387.

A reasonable alternative of rates and an opportunity to contract with full common law liability at a reasonable differential rate must be offered or the contract will be construed as unreasonable and void.

Ry. Co. vs. Cravens 38 Am. St. Rep. 230.

Monographic note, 88 Am. St. Rep. 93 ; A & E.

Again it is insisted in this case as basis of the principle determined that the contract must be *fairly* made.

How can it be said that the contract is fairly made when the carrier does not present an alternative between rates with full liability and rates with limited liability, and where as the carrier must know the value of the horse is less than one-tenth of the true value. Even in those courts where a reas-

onable limitation of liability is permitted, such a variation from the true value renders the contract unreasonable and void and a mere cloak to avoid liability.

L. & N. Ry. Co. vs. Smith 134 S. W. 866.

"When the pretended agreed valuation is not such in fact, but is simply a cloak for a limitation of liability to a fixed sum, which is less than the real value, the contract will not be valid as against a loss due to negligence."

6 Cyc. (Carriers) 401.
1 Hutchinsons Carriers 427

In an Alabama case the court said: "In determining whether a stipulation is void as being against public policy, there is no room for inquiry into the knowledge, information, or intention of the parties. The question is not what the parties knew or intended, but what is the effect of the stipulation; not whether the parties intended evil or knew their act was hurtful to the public, but whether to allow and uphold such contracts would be fraught with wrong and injury to the people of a character from which it is the province and the duty of government to protect them. So it is immaterial, when a carrier has stipulated for a limitation of damages resulting from his negligence to a greatly disproportionately small valuation of the property carried, whether he knew or was informed of its real value or not. It is against the public good in respect of a matter of governmental concern that he should be allowed to make such stipulation under any circumstances, and to allow it to stand in any instance or upon any consideration would be to emasculate the principle of public policy obtaining in the premises, and to leave the public exposed to all the uncertainties incident to inquiries into what carriers intended, or knew or had been informed as to the real value of property transported by them."

Southern Ry. Co. vs. Jones 50. (Ala.) 501.
Ry. Co. vs. Henlein 23 Am. Rep. 578.

After, however, we have given the fullest force demanded for it to the *Hart* case it must be admitted that it is determined only by the principle of estoppel and not by the

consideration of a Federal question." Upon this ground the decision of the courts of Nebraska should not be altered by this court.

It cannot be said that the Carmack Amendment or any other Federal statute validates in terms a contract limiting liability for negligence of carriers. At most it can only be said that it does not forbid them (which we cannot agree with). If then the question of estoppel is left for determination of principles of the common law, we claim the right for the state court to determine and apply these principles for itself. We also contend that as long as the Federal statute is not in conflict with the law of the state, the latter remains operative and a carrier cannot limit its liability in the States of Iowa and Nebraska. The State statutes forbidding limitation of liability are enacted under the police power of the state, and so long as the State and Federal statutes are not in conflict both may stand.

Cramer vs. Ry. Co. 133 N. W. 387.
Ry. Co. vs. Solan 169 U. S. 98.
Ry. Co. vs. Hefley 158 U. S. 98.
Hennington vs. Georgia 163 U. S. 299.
Bridge Co. vs. Kentucky 154 U. S. 204.
Transp. Co. vs. Parkersburg 107 U. S. 691.

CONCLUSION.

We therefore urge:

1. The carrier is forbidden by the laws of Iowa and Nebraska to limit its liability for negligence and these laws are not in conflict with any Federal enactment.

2. The carrier is forbidden by the Carmack Amendment to the Hepburn Act to limit its liability for negligence and the provision to limit liability so far as it may be construed to apply to damages for negligence (if indeed it does

at all) filed with the Inter-state Commerce Commission by the carrier is in conflict therewith and thereby rendered nugatory.

3. Valuation as a basis of rates cannot be the subject of contract, otherwise the door would be open to fraud and discrimination which the Inter-state Commerce law is designed to prevent: and to permit anything but the true value to be used would be a violation of the Federal statute that there shall be no false classification and no false billing.

4. The sole alternative of rates offered the shipper as shown by the terms of the contract provided for by the schedules filed were in no way conditioned upon full liability of the carrier, and the limitation of liability in no way determined or affected the rates to be charged (which was graduated by the value of the property) and cannot in a legal sense be said to be in consideration thereof. Hence, the rule of limitation does not come within the requirement of the law that all rules and regulations affecting the freight charge must be filed with the Commission and must not be departed from since it in no way affects the amount charged, and therefore has no legal significance, is an arbitrary limitation and void under the great weight of authority.

5. The schedules filed with the Commission do not in terms limit liability of the carrier for negligence; and under the rule adopted generally in the construction of contracts should not be so construed as to limit liability for negligence but only to limit such liability as may exist for causes beyond the control of the carrier.

6. The rates filed have never been approved by the Commission but in the released Rates opinion in effect disapproved. And because the alternative of rates offered is unreasonable and arbitrary, as a matter of logic, the contract of shipment does not set forth a due relation between the rate charged and the risk assumed, but is designed to compel consent to a limitation of liability; so that our case is not

within the rule of the *Hart* case, and the shipper is not within the rule of estoppel defined in that case.

7. The shipper is not estopped to enforce full liability because *he* did not fix the value, made no representation, did not mislead the carrier; and the carrier is in no way harmed since it is at liberty to collect the legal rate. Furthermore estoppel is not sufficiently pleaded.

8. If there is an estoppel it is one in pais which rests upon consideration of the principles of general jurisprudence which the State may define and apply for itself. It involves no Federal question and this court should not disturb the holdings of the State court on that ground.

9. The spirit of the Inter-state Commerce law which is to prevent discrimination and to enforce reasonable rates is best worked out by the policy of requiring true valuation as the basis for rates where rates are graduated according to value and imposing upon the carrier full liability for the true damages caused by its negligence. Equal justice can be dispensed in no other way.

Respectfully Submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 17.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

H. FRED MILLER, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

H. M. SULLIVAN,
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Attorneys for Defendant in Error.

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If it be conceded that the interpretation of the Interstate Commerce Act contended for by plaintiff in error is correct, and that its conclusions of the law as an abstract proposition are true, nevertheless it is not entitled to the benefit of the law in this case unless it has shown that honestly and in good faith it has attempted in this shipment to comply with the terms of the act.

We submit that the contract of shipment received in evidence (page 40 of abstract) discloses a deliberate intention on the part of the company to disobey the provisions of the act. In connection with the statement in the contract that the company shall not be liable in excess of the actual loss or damage, or in an amount greater than the declared valuation, is the provision "in no case shall the railway company be liable for loss or damage after delivery to any connecting line nor for any loss or damage not incurred upon its own line."

The court will observe that the latter condition is directly contrary to the provisions of the Carmack Amendment to the Interstate Act, which specifically makes the initial carrier liable for loss or damage on connecting lines.

The contract also required that the shipment should be accompanied by a care-taker, and that the company will not be liable under any conditions for injury to such care-taker, and that it shall not be liable *in any amount* for certain described cases of injury to the animals.

The schedule of rate filed with the Commission contained the provision that where the declared value exceeds one hundred ($100) dollars an additional twenty-five per cent will be made to the rate of additional declared value per head.

The company say, in their brief filed in this case, that had the declared value been as found ($1,200), the rate would have been three and three-fourths

times what it is. Under this provision of their schedule, then, or for the shipment of this horse, the total charge would have been one hundred and sixteen ($116) dollars, and if the other horse was of equal value the shipment would have been, on the two, two hundred and thirty-two ($232) dollars, or, assuming the other horse to have been of the value of only eight hundred ($800) dollars, then the cost of transporting the two would have been two hundred ($200) dollars on the declared valuation of two thousand ($2,000) dollars for the two. Yet, for a carload of horses—twenty head, 1,000 pounds each, declared value $100 each—from the same point of shipment to the same destination the freight would be seventy-five or eighty dollars (rate experts' testimony, page 34, abstract).

Section 1 of the Interstate Commerce Act provided, among other things, that all charges made for any services rendered or to be rendered in the transportation of persons or property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service, or any part thereof, is *prohibited and declared to be unlawful*. Now, it certainly requires no argument to satisfy the court that the alternative charge of twenty-five per cent (25%) for each hundred dollars that the horse is worth more than the declared value printed in the schedule of one hundred ($100) dollars is unjust and unreasonable and is by that part of the act above quoted unlawful and by the act itself prohibited.

The schedule filed with the Commission was not only unlawful and prohibited by the act for the reason last above pointed out, but was also unlawful by the provisions of section 3 of the act, which is as follows:

> "It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference to any particular person, company or firm, or any *particular description of traffic*, or to subject any particular person * * * or *description of traffic* to any undue or unreasonable *prejudice* or *disadvantage* in any respect whatsoever."

Now, it will be observed that the schedule of rates found in the record in this case, which was filed with the Commission, is based entirely upon weight. All stallions and jacks are shipped upon an assumed weight of three thousand (3,000) pounds, and yet it is common knowledge that there is not half a dozen stallions in the United States that will each weigh three thousand pounds, and probably no two jacks could be found whose combined weight would be three thousand pounds.

This schedule, then, so far as it fixed the value of the horses at three thousand pounds each, is unlawful, because under the provision of section 3 above quoted it worked an undue and unreasonable prejudice and disadvantage to this particular description of traffic or shipment.

Section 6 of the act provides that every common carrier subject to the provisions of the act shall

file with the Commission, print, and keep open for public inspection schedules showing all rates, fares, and charges between different points on its own route and between points on its own route and points on the route of any other carrier when a through route and joint rate has been established, and that the schedule shall plainly state places between which property and passengers will be carried, and shall contain the classification of freight in force. * * * Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, etc.

This provision of the act the company failed to comply with. It is true that in the trial an attempt was made by the company to show by the witness Powers, station agent at the point of shipment, that schedule required by the act was on file and the notices posted, but the witness would not testify that such was the case. The most he would say was that he knew there were *some* there, but he could not say that there was such a tariff there as enabled him to determine what the rate in this shipment should be or what the total amount of freight to destination would be. He was rather of the opinion that he ascertained the rate and the amount of freight to be paid by wiring the general freight agent. He would not say that the notices required by the act were posted at the time of the shipment. The most he would say was that he thought he saw them there afterwards

and that he did not post the same himself afterwards.

The purpose of the Interstate Commerce Act providing that the rate schedules shall be printed in large type and kept posted in the depots is to enable the shipper to know the regular rate, and if there are alternate rates, to be also informed of the same. This is an important feature of the act. Under the evidence showing the peculiar circumstances surrounding this shipment it is certain that the party loading horses and signing the contract of shipment did not know the terms of the contract, or that there was a declared value therein, or that the contract provides that in case of loss the amount of recovery should be limited to the declared value. The plaintiff in error insists that he was bound to know these terms; that as a matter of law he is conclusively presumed to have known them. We say this can only be true when the means provided by the Interstate Commerce Act, by which the shipper may acquire this knowledge, has been complied with by the company, and that since this provision of the act has been violated by the company, there is no presumption that the shipper knew the contents of the contract.

Finally, defendant in error contends that the judgment of the Supreme Court of Nebraska in this case cannot be set aside by this court for the reason that the rate charged for the two horses, and which was paid by defendant in error on the

live horse shipped with the one killed, was fixed and determined by the railroad company without any reference to the declared value by the shipper, and the rate fixed by the company was not based in any way upon the declared value. That this is true is clearly established by the testimony of the company from its Exhibit 11 and the oral testimony of its freight expert, Buckingham. This Exhibit 11 is the way-bill or freight bill which accompanied the horses from point of shipment to destination in the hands of the various conductors of the train carrying the horses. It was originally prepared and made up at the time the contract of shipment was entered into between the company and defendant in error; the company say that as originally made up it designated the shipment as two horses weighing thirty-five hundred (3,500) pounds, at a rate of one and thirty-one one-hundredths ($1.31) dollars per hundred, and the total freight of forty-five and eighty-five one-hundredths ($45.85) dollars. The witness Buckingham testified that after the shipment had been partially accomplished, after the horses had passed beyond the State where loaded and into the State of their destination, that a new rate was made by the company; that, instead of permitting the horses to go on through to their destination on the estimated weight of thirty-five hundred (3,500) pounds at one dollar and thirty-one one-hundredths ($1.31) per hundred, the company changed the estimated weight to six thousand

(6,000) pounds and made a new rate of one dollar three and eight-tenths cents ($1.038) and changed the aggregate freight from forty-five and eighty-one one-hundredths ($45.81) dollars, as fixed when the contract of shipment was made, to sixty-two and twenty-eight one-hundredths ($62.28) dollars, and this rate was paid at point of destination for the uninjured horse, no freight having been paid for the dead one. The company cannot contend in the face of this evidence that this latter rate was made with reference to the declared value designated in the contract of shipment. The contract did not accompany the shipment, as the writer recollects the testimony, but after being signed by the shipper it was sent to the general office of the company. Therefore we contend that because the company finally made a rate entirely uninfluenced by the declared valuation of the horses and uninfluenced by the contract of shipment, it cannot be heard to insist upon this contract as an excuse for not paying the full value of the horse as found by the jury.

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